Supreme Court, U.S.
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No. 04-

IN THE

# Supreme Court of the United States

LIFE INVESTORS INSURANCE COMPANY OF AMERICA,

*Petitioner*,

*v.*

LAJUAN C. JOHNSON and STEVEN JOHNSON,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

Did the Tenth Circuit, in this diversity action, properly award an insured his attorneys' fees in a first-party action against his insurer, in the absence of statute or contract and in the absence of a breach of the covenant of good faith and fair dealing, when such an award is contrary to Utah Supreme Court precedent and the law of a majority of jurisdictions?

Did the Tenth Circuit properly determine there was coverage for the insured's death which resulted from an accident which was caused by his pre-existing illness, despite policy language that excluded coverage for an injury "caused or contributed by, or as a consequence of . . . any sickness or infirmity . . . ?"

## CORPORATE DISCLOSURE STATEMENT

Petitioner, Life Investors Insurance Company of America, is wholly owned by AEGON USA, Inc.

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Life Investors Insurance Company of America respectfully files this Petition for Writ of Certiorari to review the ruling of the Tenth Circuit Court of Appeals in this case.

## OPINIONS BELOW

The Order and Judgment from which Petitioner appeals was entered by the United States Court of Appeals for the Tenth Circuit on May 27, 2004, docket no. 01-4254 (P. App. 1) The Court's Opinion is reported at *Johnson v. Life Investors Ins. Co. of America*, 98 Fed. Appx. 814 (10th Cir. 2004). The Order of the United States District Court for the District of Utah was filed on September 7, 2001 (P. App. 2) and the Court's subsequent Order and Judgment was entered on November 27, 2001. (P. App. 3)

The Tenth Circuit Court decided a previous, consolidated appeal filed by Life Investors Insurance Company of America and Monumental Life Insurance Company, and a cross-appeal filed by Lajuan and Steven Johnson, in *Johnson v. Life Investors Insurance Company of America*, 216 F.3d 1087 (Table) 2000 WL 954840 (10th Cir. 2000). (P. App. 4)

## STATEMENT OF JURISDICTION

The judgment of the Tenth Circuit Court of Appeals was entered on May 27, 2004. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## STATUTES OR OTHER PROVISIONS INVOLVED

N/A

## STATEMENT OF THE CASE

Mr. Marvin Johnson was insured for accidental death[1] by Life Investors. Mr. Johnson suffered from a form of muscular dystrophy, which caused among other things, occasional dizzy spells. Mr. Johnson experienced such a dizzy spell walking up the stairs in his home and fell. In that fall, Mr. Johnson broke his neck, and subsequently died in the hospital.

Life Investors denied coverage for Mr. Johnson's death based on two provisions in the insurance policy. First, the policy required that for coverage to exist, the insured's death had to be the result of accidental bodily injury, independent of all other causes. Second, the policy excluded loss resulting from an injury caused by, or as a consequence of, any sickness or infirmity. Life Investors determined Mr. Johnson's death was the result of an injury that was caused by a sickness or infirmity (his muscular dystrophy) and was not independent of all other causes.

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1. Unlike life insurance, accidental death insurance is generally issued (as it was in this case) without underwriting and without regard to an applicant's health. Typically, no questions about health are asked and no physical examination is required because accidental death insurance excludes coverage for health risks. That is because under an accidental death policy the injury leading to death cannot be caused by, contributed to or the consequence of any sickness or infirmity. Accidental death coverage, therefore, is much narrower than a life insurance policy. This distinction between life insurance and accidental death insurance coverage is further demonstrated by the difference in policy premiums. Mr. Johnson would have paid as much as five times more in annual premiums for life insurance coverage, compared to what he paid for the accidental death coverage.

Plaintiffs, Mr. Johnson's beneficiaries, sued Life Investors for breach of contract. Following a previous appeal to the Tenth Circuit, and remand, the parties filed cross-motions for summary judgment. Attempting to apply Utah law in this diversity action, the District Court granted the Johnsons' motion, ruling that neither of the above-cited provisions of the policy applied in this case, and required Life Investors to cover this accident. Importantly, the court did *not* find Life Investors had breached the implied covenant of good faith and fair dealing. The District Court also awarded the Johnsons their attorneys' fees.

On appeal, the Tenth Circuit affirmed the District Court's grant of summary judgment, and the award of attorneys' fees. Life Investors now seeks a Writ of Certiorari arguing the District Court and the Tenth Circuit awarded attorneys' fees contrary to Utah Supreme Court precedent, and the law of a majority of jurisdictions, as Utah courts do not allow an award of attorneys' fees unless the court finds a breach of the covenant of good faith and fair dealing. Life Investors further argues the district court and the Tenth Circuit misapplied Utah law in allowing for coverage despite policy language that excludes coverage for an injury caused by a pre-existing illness.

## REASONS FOR GRANTING THE PETITION

### A. Award of Attorneys' Fees Was Improper

In a diversity action, a federal court is required to apply the substantive law of the state in which it sits. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938). Further, an award of attorneys' fees is substantive, and should be determined in accordance with state law. *Matter of King Resources Co.*, 651 F.2d 1349, 1353 (10th Cir. 1981), *cert.*

*denied*, 454 U.S. 881, 102 S. Ct. 370, 70 L. Ed. 2d 195 (1981) ("[I]n diversity cases generally, and certainly in this circuit, attorney fees are determined by state law and are substantive for diversity purposes.") As a result, both the District Court and the Tenth Circuit were required to apply Utah law to an award of attorneys' fees in the present case.

In Utah the general rule is that a party may only recover attorneys' fees if allowed by statute or contract. *See Turtle Management, Inc. v. Haggis Management, Inc.*, 645 P.2d 667 (Utah 1982), and *Occidental/Nebraska Fed. Sav. Bank v. Mehr*, 791 P.2d 217 (Utah Ct. App. 1990). In the present case, neither contract or statute allowed for the recovery of attorneys' fees. However, Utah courts have recognized narrow exceptions to this rule. As the Utah Court of Appeals stated, "Our courts have carved out a *narrow* exception to this rule in the insurance context. When an insurance company breaches the implied covenant to perform its obligations in good faith, the insured can recover his or her attorney fees as consequential damages of the breach." *Pugh v. North American Warranty Services, Inc.*, 1 P.3d 570, 574 (Utah Ct. App. 2000) (citations omitted) (emphasis added). Similarly, in *Lieber v. ITT Hartford Insurance Center, Inc.*, 15 P.3d 1030, 1037 (Utah 2000) the Utah Supreme Court stated, "Attorney fees may be awarded where a breach of the implied covenant of good faith and fair dealing, inherent in every insurance contract, has occurred."

The Utah Supreme Court has also vacated awards of attorneys' fees in the absence of a breach of the covenant of good faith and fair dealing. In *Gibbs M. Smith, Inc. v. U.S. Fidelity & Guarantee Co.*, 949 P.2d 337 (Utah 1997), in a declaratory action between the insured and the insurer regarding coverage, the court found the insurance company

incorrectly denied coverage. The trial court further awarded attorneys' fees to the insured. The Utah Supreme Court held that attorneys' fees are recoverable when the insured breaches the covenant of good faith and fair dealing. However, vacating the award of attorneys' fees, the court noted, "no determination was made whether the covenant [of good faith and fair dealing] was breached. Thus the award of attorney fees made by the trial court cannot stand." *Id.* at 345

Similarly, in *Western Casualty and Surety Company v. Marchant*, 615 P.2d 423 (Utah 1980), plaintiff refused coverage for the accident in question, and brought a declaratory action to determine coverage. The court determined that plaintiff was required to cover the accident in question. While the court did state that an award of attorneys' fees is appropriate for a breach of the covenant of good faith and fair dealing, the court did not find such a breach in this case, and refused to award attorneys' fees, stating:

> Moreover, no such finding would be warranted where the plaintiff merely stated its position and initiated this action for determination of what appears to be a justiciable controversy. It would not comport with our ideas of either law or justice to prevent any party who entertains bona fide questions about his legal obligations from seeking adjudication thereon in the courts. There being no foundation for the award of attorneys' fees to the defendant, that portion of the judgment is vacated.

*Id.* at 427. *See also Farmers Ins. Exch. v. Call*, 712 P.2d 231 (Utah 1985).

Utah courts have also recognized the "third-party tort rule" which allows an insured to recover attorneys' fees from its insurer as consequential damages when the insurer's breach of the insurance policy caused the insurer to incur attorneys' fees *in litigation with a third party*. *See Collier v. Heinz*, 827 P.2d 982, 984 (Utah Ct. App. 1992)

> A well-established exception to this general rule [that attorneys' fees only be awarded based on statute or contract] allows recovery of attorney fees as consequential damages, but *only* in the limited situation where the defendant's breach of contract foreseeably caused the plaintiff to incur attorney fees *through litigation with a third party*. Under the third-party attorney fees exception, only fees incurred in litigation with the third party are recoverable as consequential damages. Hence, even under the third-party exception, attorney fees incurred in litigation between the contracting parties are not recoverable by the non-breaching party as damages.

(Citations omitted) (emphasis added). *See also South Sanpitch Co. v. Pack*, 765 P.2d 1279, 1283 (Utah Ct. App. 1988). The present case does not involve litigation with a third party.

As can be seen, Utah courts have not allowed for recovery of attorneys' fees in the first-party situation, absent a breach of the covenant of good faith and fair dealing. In fact, Utah courts have overturned such awards in the absence of a breach of the covenant. Additionally, the position taken by Utah courts is consistent with the majority of jurisdictions. *See* Jane Massey Draper, *Insured's Right to Recover Attorneys' Fees Incurred in*

*Declaratory Judgment Action to Determine Existence of Coverage Under Liability Policy*, 87 A.L.R3d. 429 (1978).

Despite the case law cited above, the Tenth Circuit relied solely on, and misread, *Billings v. Union Bankers Ins. Co.*, 918 P.2d 461 (Utah 1996) to support an award of attorney's fees. In *Billings* an insured sued his health insurer for breach of contract and breach of the covenant of good faith and fair dealing related to a denial of coverage. Union Bankers was found liable under both the breach of contract and breach of the covenant of good faith and fair dealing, and the court awarded attorney's fees. The Utah Supreme Court held:

> [W]e affirm the jury's finding that Union Bankers is liable for breaching the implied covenant of good faith and fair dealing. We also conclude that the district court erred in instructing the jury that it could award broad consequential damages for breach of the express terms of the insurance contract. We nonetheless affirm the verdict because the jury was properly instructed that it could award such damages for breach of the implied covenant and the evidence is sufficient to sustain the verdict under the alternative theory of recovery.

*Billings* at 468. Thus, *Billings* does not stand for the proposition that attorneys' fees may be awarded in a first-party setting, in the absence of a breach of the covenant of good faith and fair dealing, as the court specifically found such a breach. The language cited by the Tenth Circuit is mere dicta, and contradicts Utah Supreme Court precedent, as well as the actual holdings in *Billings*.

Certiorari should be granted in the instant case to correct the Tenth Circuit's creation of new substantive law in the State of Utah. The Tenth Circuit should not be allowed, in diversity cases, to ignore the substantive law of the state, and instead create their own judicially created remedies.

## B. The Tenth Circuit Incorrectly Determined Coverage Existed in Violation of Public Policy.

As indicated above, accidental death policies are different than life insurance policies. Unlike life insurance, accidental death insurance is generally issued (as it was in this case) without underwriting and without regard to an applicant's health because accidental death insurance excludes coverage for health risks. Additionally, premiums for such coverage are generally much cheaper than for life insurance because the insurer only assumes the risk of death that is solely caused by an accident independent of any health risks. In *Long v. Railway Mail Ass'n*, 17 N.W.2d 675, 678 (Neb. 1945) the court stated, "While a contract of insurance should be construed and applied as written, any construction which would defeat the purposes of accident insurance must be avoided. Likewise, an interpretation which would have the effect of converting accident into life insurance would be just as destructive of the public good."[2] Similarly, in *Mutual Benefit Health & Accident Assoc. v. Hudman*, 398 S.W.2d 110, 112 (Tex. 1965) the court stated, "This limitation upon the cause of death cannot be ignored, because it was the basis of the agreement."

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2. For a discussion of the purposes and history of accidental death insurance *see* Adam F. Scales, *Man, God and the Serbonian Bog: The Evolution of Accidental Death Insurance*, 86 Iowa L. Rev. 173 (2000).

In *Long*, the court analyzed an accidental death policy similar to that in the present case. There the court stated, "We quite agree that if . . . the purported accident was the result of the existing disease or condition, no recovery can be had." *Long* at 679. Similarly, in *Gordon v. American Motorists Ins. Co.*, 274 F. Supp. 592, 594 (D. Fl. 1967) the court stated:

> The law is clear that in an action upon an accident policy of the sort here in issue, the plaintiff must establish that the death was caused by accident, resulting directly and independently of all other causes, from injury, and was not caused by and did not result from disease . . . Moreover, the cases in this jurisdiction . . . have consistently held that there can be no recovery where the insured's preexisting condition caused . . . an accident to produce death.

In the present case the insured's preexisting condition, muscular dystrophy, caused an accident which resulted in his death. It is clear under the plain language of the policy, and case law interpreting such policies, that the death is not covered. This is exactly the type of risk Life Investors did not agree to cover, as it was the result of the insured's preexisting condition. Both the District Court and the Tenth Circuit engaged in a form of legal gymnastics construing the policy in question and distinguishing case law to afford coverage where none existed. Such an interpretation and conversion of the policy from an accidental death policy to a life insurance policy is improper and against public policy.

## CONCLUSION

Based upon the foregoing, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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# APPENDIX

## APPENDIX 1 — ORDER AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT FILED MAY 27, 2004

**UNITED STATES COURT OF APPEALS**
**TENTH CIRCUIT**

No. 01-4254
D.C. No. 2:96 CV-0283-G
District of Utah

LAJUAN C. JOHNSON and STEVEN JOHNSON,

Plaintiffs-Appellees,

v.

LIFE INVESTORS' INSURANCE COMPANY OF AMERICA,

Defendant-Appellant.

**ORDER AND JUDGMENT***

Before **TACHA**, Chief Judge, and **HOLLOWAY** and **EBEL**, Circuit Judges.

This is an appeal from a summary judgment for the plaintiffs in a diversity suit arising from a dispute over the

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. This court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

scope of an accidental death insurance policy. The defendant insurance company denied the plaintiffs' claim under the policy on the ground that the fall by the decedent Marvin Johnson and his resulting death were caused in whole or in part by his illness, muscular dystrophy. Plaintiffs sued, claiming that the policy covered Johnson's accidental death and did not exclude coverage. The district court agreed and granted the plaintiffs, the beneficiary under the policy and Johnson's personal representative, summary judgment.

The resulting judgment that was entered was for $305,291.33, costs of $3,041.91, and attorney's fees of $72,907.08, all awarded against Defendant-Appellant Life Investors Insurance Company of America (Life Investors). I Aplt.-App. at 196-98. As explained in more detail below, we agree with the rulings of the district judge and affirm, remanding for the district judge to award appellate attorney's fees.

## I

## *Background*

### A

The subsidiary facts are not in dispute. As related in the order of the district judge which granted summary judgment for Life Investors, the facts are as follows.

In 1993, Life Investors assumed an accidental death policy bought by the decedent Marvin Johnson. I Aplt.App. 179. The policy provided an accidental death benefit of

$200,000, hospitalization benefits of $200.00 per day and $250.00 per day for intensive care. *Id.* Plaintiff/Appellee Stephen Johnson is the beneficiary under the policy and Plaintiff/Appellee LaJuan Johnson is the personal representative of Marvin Johnson's estate.

In 1974, at the age of 42, Johnson was diagnosed with myotonic dystrophy, a form of muscular dystrophy. *Id.* at 180. Although the disease caused his muscles to weaken, Johnson remained active. *Id.* He occasionally fell due to a loss of balance. *Id.* In 1991, Mr. Johnson fell forward down a set of stairs and received treatment in the hospital for minor injuries. *Id.*

On July 29, 1995, Mr. Johnson stumbled and fell backward down the stairs to his basement. *Id.* at 180. On July 30, 1995, Johnson was admitted to a hospital for a cervical spine fracture in his neck. On August 1, 1995, Johnson developed pneumonia and the doctors had difficulty intubating him because of his neck fracture. *Id.* On August 2, 1995, when it became apparent that Mr. Johnson could no longer breathe on his own, his family decided to withdraw artificial life support measures. *Id.* Johnson died that day and his physician, Dr. Edward Campbell, listed the immediate cause of death on the death certificate as pneumonia due to, or as a consequence of, a cervical spine fracture, and the underlying cause of death as myotonic dystrophy. *Id.* at 180. The doctor identified the manner of death as an "accident." *Id.*

Life Investors denied the plaintiffs' claims under the insurance policy, claiming that Johnson's hospitalization and

death were not covered as a result of his preexisting illness. *Id.* Life Investors relied on the language in the policy excluding death caused by sickness and defining injury as that caused by an accident "independent of all other causes." *Id.* Plaintiffs then brought this diversity suit which is the subject of this appeal.

In an earlier proceeding, the district court granted plaintiffs summary judgment against Life Investors and Monumental Life Insurance Company, which both issued policies in favor of Marvin Johnson. Summary judgment against both companies was entered on the reasoning that the companies were estopped to deny coverage because they failed to disclose the sickness exclusion prominently, as required by Utah insurance regulations. Order and Judgment at 5-6.[1] On appeal, we reversed because the Life Investors's policy was issued before the enactment of the disclosure regulations and, therefore, Life Investors was not estopped from denying coverage.[2] *Johnson v. Life Investors of Am.*,

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1. The disclosure regulation provides:

> Accident-Only Disclosure. All accident-only policies shall contain a prominent statement on the first page of the policy, or attached thereto, in either contrasting color or in boldface type at least equal to the size of type used for policy captions, as follows: "This is an accident-only policy, and it does not pay benefits for loss from sickness."

Utah Admin. Code R590-126-6G.

2. In that same appeal, we also affirmed summary judgment for the plaintiffs in their claim against Monumental Life Investors company based upon a separate accident insurance policy that was issued after the effective date of Utah's disclosure regulation.

2000 WL 954840, 2000 U.S.App. Lexis 16049 (10th Cir.2000).

On remand, the district court again granted summary judgment for the plaintiffs because it construed the terms of the policy as not excluding coverage for cases where an accident was caused by illness. Life Investors now appeals.

## II

### *The District Court Ruling*

The district court granted plaintiffs summary judgment on the ground that the insurance policy issued by Life Investors did not exclude coverage in cases where an accident is caused by illness. In coming to that conclusion, the district court primarily relies upon *Browning v. Equitable Life Assurance Society,* 94 Utah 532, 72 P.2d 1060, 1072 (Utah 1937) (*Browning I*). The insurance policy in *Browning* covered losses "resulting directly and independently of other causes, from bodily injuries effected . . . solely through external, violent, and accidental means" and the insured's disability was caused by a combination of an accidental sprain of his finger and preexisting toxemia. *Id.* Nonetheless, the Utah court held that the insurance policy provided coverage, reasoning that "If the deceased suffered death by drowning, no matter what was the cause of his falling into the water, whether disease or a slipping, the drowning, in such case, would be the proximate and sole cause of the disability or death. . . ." *Id.* at 1076 (citations omitted).

*Appendix 1*

Turning to the facts in this case, the district court observed that the insurance policy at issue confined the scope of its coverage to those events that "create[] a loss due, directly and independently of all other causes, to [an] accidental bodily injury." Applying *Browning I* to these facts, the district court reasoned that even if illness had caused Marvin Johnson's fall, he would be covered by the policy since it was the accidental fall that was the "proximate and sole" cause of his injury. The district court also noted that Life Investors could have but did not explicitly exclude coverage where illness is the cause of an accident. Accordingly, the district court concluded that the plaintiffs were entitled to summary judgment against Life Investors.

The district court also awarded plaintiffs attorneys fees as the party injured by Life Investors's breach of the express terms of the insurance contract under *Billings v. Union Bankers Ins. Co.*, 918 P.2d 461, 468 (Utah 1996).

**III**

*Discussion*

A grant of summary judgment by the district court is reviewed *de novo*. *Simms v. Oklahoma*, 165 F.3d 1321, 1326 (10th Cir.1999). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). When determining whether judgment as a matter of law is appropriate, "we view the evidence and

draw reasonable inferences therefrom in the light most favorable to the nonmoving party." *Simms,* 165 F.3d at 1326. This court also reviews district court determinations of state law *de novo. Mares v. ConAgra Poultry Co.,* 971 F.2d 492, 495 (10th Cir.1992).

A

On appeal, Life Investors argues that the coverage requirement that a loss must be created by an accidental bodily injury "independently of all other causes" precludes coverage here. Appellant's Opening Brief at 14. In addition to that coverage requirement, Life Investors relied on the language in the policy excluding death caused by sickness, and defining injury as that caused by an accident "independent of all other causes." Order Granting Summary Judgment for Plaintiffs at 2, Addendum to Appellant's Opening Brief. The parties filed cross-motions for summary judgment. The plaintiffs' motion sought the benefits under the policy, prejudgment interest and attorney's fees. Defendant Life Investors sought a ruling of no coverage or, in the alternative, a ruling that there is a question of fact as to coverage that must go to the jury. The district judge granted summary judgment for the plaintiffs.

The Utah Supreme Court in *Browning v. Equitable Life Assur. Soc. of the United States,* 94 Utah 532, 72 P.2d 1060, 1073 (1937) (*Browning I*), in a similar insurance case, stated:

> This jurisdiction, like many others, has declared in favor of a liberal construction in favor of the insured to accomplish the purpose for which the

> insurance was taken out and for which the premium was paid. *Colovos v. Home Ins. Co. of New York,* 82 Utah 401, 28 P.2d 607. . . .

*Browning I* upheld a judgment for the insured plaintiff who suffered an injury to his finger, disabling him from performing his duties as a dentist. He recovered disability payments under his policy for interruption of his professional duties. The fall involved in *Browning* and that of Johnson in the instant case present similar accidental circumstances. We are persuaded that under the interpretation of such policy provisions in Utah, the district judge correctly upheld the claim of Johnson for recovery. We are convinced that the district judge properly concluded as follows:

> This court finds that an ordinary meaning for the term "loss" as used in the context of Defendant's policy is hospitalization and death. If Defendant wanted to exclude coverage where sickness is the cause of an accident, rather than the cause of the loss, it could have easily written that specifically into the policy. Having not excluded coverage where sickness is the cause of the accident, the plain language of the policy provides coverage in this instance. Accordingly, this court grants Plaintiff's motion for summary judgment as to coverage and pre-judgment interest.

Order at 6.

Nor does the policy's exclusionary clause dictate a different result. Under Utah law, "insurance policies should

be strictly construed against the insurer and in favor of the insured because they are adhesion contracts drafted by the insurance companies." *United States Fidelity & Guar. Co. v. Sandt,* 854 P.2d 519, 522 (Utah 1993). In this case, the policy at issue contained an exclusionary clause that provided the policy "does not insure for any *loss* resulting from any injury caused or contributed to by, or as a consequence of . . . any sickness or infirmity. . . ." II Aplt.-App. at 139 (emphasis added).

As noted above, the ordinary meaning for the term "loss," in the context of such an insurance policy, is hospitalization and death. Therefore, when "strictly construed against" Life Investors, this exclusionary clause excludes coverage only where the sickness or infirmity "caused or contributed to" the hospitalization and death. In other words, coverage is denied under this policy only where the illness causes the hospitalization and death, e.g., heart attack leading to death, and not where the illness causes an accident that causes the death, e.g., a mild heart attack while driving leading to a fatal car accident.

If, as the district court noted, Life Investors wanted to exclude coverage where the *accident* rather then the loss was caused by sickness or infirmity, it could have done so. One way would have been to include the exclusion clause at issue in *Browning v. Equitable Life Assur. Soc.,* 94 Utah 570, 80 P.2d 348 (1938) (*Browning II*), which was the reconsideration of that court's earlier decision in *Browning I,* 72 P.2d at 1060.

In *Browning II,* the insurance policy provided: "The insurance . . . shall not cover accident, injury, disability,

death or other loss caused directly or indirectly, wholly or partly, by . . . any other kind of disease." *Browning II,* 80 P.2d at 351. Thus, in that case, even a strict construction of the exclusionary clause would lead to the conclusion that the policy does not cover *accidents* caused by disease. As such, the Utah Supreme Court concluded the exclusionary clause meant that: "If the accident or injury resulting in the disability or loss was produced, caused, set in motion or operation by disease or infirmity, then it is indirectly caused by such disease or infirmity and is to be regarded as the result of sickness and not of accident." *Id.* at 352.

In this case, the insurance policy did not contain the explicit exclusion of coverage that the policy at issue in *Browning II* did. Therefore, as noted above, a strict construction of this policy leads to the conclusion that the policy excludes coverage only where the sickness or infirmity directly causes the loss. Since it is undisputed that the immediate cause of Johnson's loss was a fall, it is irrelevant under the terms of this policy whether the fall was caused by his myopic dystrophy. Accordingly, summary judgment for Johnson was appropriate.

B

*Attorney's Fees*

Life Investors argues that the language in *Billings v. Union Bankers Ins. Co.,* 918 P.2d 461 (Utah 1996), that permits an award of attorney fees against an insurer for breach of express contract is mere dicta, that the language in *Billings* has not been applied in Utah and therefore should not be followed. We do not agree.

*Appendix 1*

In *Billings* the Utah Supreme Court stated clearly:

> Attorney fees may be recoverable as consequential damages flowing from an insurer's breach of either the express or the implied terms of an insurance contract. See *Canyon Country Store v. Bracey,* 781 P.2d 414, 420 n.4 (Utah 1989).

*Billings,* 918 P.2d at 468.

As the *Billings* opinion shows, 918 P.2d at 464, the jury there returned a special verdict finding that Union Bank had breached both the covenant of good faith and fair dealing and the express coverage provision of the insurance contract. There was a dispute as to the amount of the attorney's fees in *Billings,* but the right to the recovery of fees was not denied by the Utah Supreme Court. In fact, the separate opinion of Justice Howe, concurring and dissenting, recognized that the majority had sanctioned the award of attorney's fees as an element of consequential damages for both the breach of the implied covenant of good faith and fair dealing and the express provisions of the contract. 918 P.2d at 469.

We are not persuaded by the arguments of Life Investors that the ruling on attorney's fees in *Billings* was mere dicta. Moreover in making a prognostication of what the highest state court will decide, the decisions of lower state courts and other federal courts are of "somewhat less importance" than even considered dicta by the state's "highest court." *Florom v. Elliott Mfg.,* 867 F.2d 570, 580 (10th Cir.1989); see also *McKenna v. Ortho Pharmaceutical Corp.,* 622 F.2d 657, 662 and n. 21 (3rd Cir.), *cert. denied,* 449 U.S. 976 (1980).

In sum, we are persuaded that we should affirm both the ruling of the district court granting summary judgment for the Plaintiff Appellees and the award of attorney's fees for services in the district court. A request is made by the Appellees for costs and reasonable attorney's fees incurred on this appeal. Appellees' Brief at 27. These matters should be determined in the first instance by the district court.

Accordingly, the judgment is AFFIRMED with the appellate costs and fees to be determined on remand.

IT IS SO ORDERED.

ENTERED FOR THE COURT

William J. Holloway, Jr.
Circuit Judge

## APPENDIX 2 — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION DATED AND FILED SEPTEMBER 7, 2001

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Civil No. 2:96 CV 283K

LUJUAN C. JOHNSON and STEVEN JOHNSON,

Plaintiff,

v.

LIFE INVESTORS INSURANCE COMPANY OF AMERICA, an Iowa corporation.

Defendants.

ORDER

This matter is before the court on the parties' cross motions for summary judgment. A hearing was held on the motions on August 30, 2001. Plaintiffs were represented by John P. Ashton and Defendant was represented by Michael Homer and J. Rand Hirschi. The court has carefully considered all pleadings, memoranda, and other materials submitted by the parties and further considered the law and facts relevant to the parties' motions. Now being fully advised, the court enters the following order.

*Appendix 2*

## BACKGROUND

In 1993, Life Investors Insurance Company assumed an accidental death policy bought by Marvin Johnson. The insurance policy provides an accidental death benefit of $200,000 and hospitalization benefits of $200.00 per day and $250.00 per day for intensive care. Plaintiff Stephen Johnson is the beneficiary under the policy and Plaintiff Laluan Johnson is the personal representative of Marvin Johnson's estate.

In 1974, at the age of 42, Johnson was diagnosed with myotonic dystrophy, a form of muscular dystrophy. Although the disease caused his muscles to weaken, Johnson remained active. He occasionally fell due to a loss of balance. In 1991, he was treated at a hospital for minor injuries resulting from a forward fall down a set of stairs.

On July 29, 1995, Johnson was home alone when he stumbled and fell backward down the stairs to his basement. Although there are no witnesses to the fall, the parties do not dispute that the fall occurred. Johnson was admitted to the hospital on July 30, 1995 for a cervical spine fracture in his neck. He began to develop pneumonia on August 1, 1995, and the doctors had difficulty intubating him because of his neck fracture. On August 2, 1995, it became apparent that Johnson could not breathe on his own and his family decided to withdraw artificial life support measures. Johnson died that day and his doctor listed the immediate cause of death as pneumonia due to or as a consequence of a cervical spine fracture, and the underlying cause of death as myotonic dystrophy. The doctor identified the manner of death as an accident.

*Appendix 2*

Defendant denied Plaintiffs' claim under the insurance policy, claiming that Johnson's hospitalization and death were not covered as a result of his pre-existing illness. Defendant relied on the language in the policy excluding death caused by sickness and defining injury as that caused by an accident "independent of all other causes."

The parties have filed cross motions for summary judgment pursuant to the terms of the policy. Plaintiffs' motion for summary judgment seeks the benefits under the insurance contract, pre judgment interest, and attorneys' fees. Defendant seeks a ruling of no coverage or, in the alternative, a ruling that there is a question of fact as to coverage that must go to the jury.

**DISCUSSION**

Because this court's jurisdiction is based on diversity of citizenship, this court must apply the substantive law of the forum state of Utah with the objective of reaching the same result as a Utah court. *See Brodie v. General Chem. Corp.*, 112 F.3d 440, 442 (10th Cir. 1997). However, federal law controls whether summary judgment is procedurally appropriate. *See Oja v. Howmedica, Inc.*, 111 F.3d 782, 792 (10th Cir. 1997). Summary judgment is proper if the evidence shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56 (c). In applying this standard, the court must construe all facts and reasonable inferences in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Wright v. Southwestern Bell Tel. Co.*, 925 F.2d 1283, 1292 (10th Cir. 1991).

*Appendix 2*

**Policy Interpretation**

Plaintiffs assert that Life Investors' denial of their claim based on the allegation that myotonic dystrophy caused or contributed to Johnson's fall is improper because the language of the policy addresses only the cause of the loss or the cause of the injury causing the loss, not the cause of the accident. Defendant contends that the coverage determination under the policy requires a finding of whether Johnson's myotonic dystrophy was a cause of his fall which caused his injuries which required hospitalization and eventually was the result of his death.

Under the relevant coverage portion of the policy, it defines injury to include "bodily injury" that must have been "caused by an accident," that must have resulted in a "loss insured by the policy," and that the loss must be "due, directly and independently of all other causes, to . . . accidental bodily injury." The policy's relevant exclusion excludes coverage "for loss resulting from an Injury caused or contributed to by, or as a consequence of . . . any sickness or infirmity unless the treatment of such is required as the direct result of an accidental bodily injury."[1]

1. Defendants rely in part on the Tenth Circuit decision in *Winchester v. Prudential Life Ins. Co.*, 975 F.2d 1479 (10th Cir. 1992). However, this court finds that *Winchester* is factually and legally distinguishable. *Winchester* does not address the issue present here, which is whether there is coverage when the pre-existing condition is not alleged to have contributed to the "loss," but to the accident that caused the loss. Moreover, *Winchester is* so factually distinguishable that it is not controlling with respect to this court's decision. Rather, this court must rely on Utah case law and determine how a Utah court would rule on the issue.

*Appendix 2*

Utah courts generally construe insurance policies strictly, giving any doubt to the insured. *In Browning v. Equitable Life Assurance Society*, 72 P.2d 1060, 1073 (Utah 1937), the court construed a similar policy that insured "against loss resulting directly and independently of all other causes, from bodily injuries effected . . . solely through external, violent, and accidental means." In *Browning*, the insured dentist brought a disability claim when he accidentally sprained his index finger which prevented him from working. The sprain apparently combined with a latent level of toxemia in his system, resulting in arthritis which caused him to be permanently disabled. The court did an extensive analysis of the policy language and case law construing similar language and concluded that the policy at issue provided coverage. *Id.* at 1074-77.

In its analysis, the *Browning* court explained that

> a sick man may be the subject of an accident which would not have befallen him but for his sickness. One may meet his death by falling into a place of danger in a faint or in a fit of epilepsy. But such an event has usually been held to be the result of an accident, not of disease. . . . "If the deceased suffered death by drowning, no matter what was the cause of his falling into the water, whether disease or a slipping, the drowning, in such case, would be the proximate and sole cause of the disability or death, unless it appeared that death would have been the result even had there been no water at hand to fall into. The disease would be but the condition; the drowning would be the moving, sole, and proximate cause."

*Id.* at 1076 (citations omitted).

*Appendix 2*

On rehearing in *Browning*, the court refused to reconsider its previous ruling but it did consider a separate exclusion to the accident policy not previously asserted by the insurer. *Browning v. Equitable Life Assurance Society*, 80 P.2d 348, 350-51 (Utah 1938). The exclusion expressly excluded coverage where the accident is caused by an illness, stating that the insurance "shall not cover the *accident*, injury, disability, death or other loss *caused* directly or indirectly, wholly or partly, by bodily or mental infirmity . . . or by any other kind of disease." *Browning v. Equitable Life Assurance Society*, 80 P.2d 348, 351 (Utah 1938). Thus, the exclusion expressly defined the accident as part of the loss.

Under the reasoning of *Browning*, the policy language at issue in this case requiring that the loss must be "due, directly and independently of all other causes, to . . . accidental bodily injury" allows coverage for Johnson's hospitalization and death. In addition, the exclusion analyzed by the *Browning* court on rehearing is in stark contrast to the exclusion in this case. The exclusion in this case has no language specifically excluding coverage based on the cause of the accident, it excludes coverage for "loss" caused *by* "any sickness or infirmity unless the treatment of such is required as the direct result of an accidental bodily injury."

The policy in this case does not define the term "loss." Plaintiffs argue that loss must be defined in conjunction with the benefits provided by the policy and, therefore, mean hospitalization and death. Plaintiffs also assert that, in a general insurance context, Webster's dictionary's definition of loss is "the amount of an insured's financial detriment by death or damage that the insurer becomes liable for."

*Appendix 2*

Defendant claims that loss should have a broad meaning and encompass accident, injury or disability. Defendant also argues that *Whitlock v. Old American Insurance Co.*, 442 P.2d 26 (Utah 1968) requires the question as to the cause of the accident to go to the jury. The *Whitlock* court characterized the *Browning* court's ruling on rehearing as holding that "if the diseased condition of the insured did not contribute in bringing about the accident and injury, but merely aggravated the consequences of it, the plaintiff was entitled to recover." *Id.* at 28. However, Whitlock's discussion of *Browning* must be read in light of the fact that the *Browning* court on rehearing was construing an exclusion significantly different than the exclusion at issue in this case.

Because this court must strictly construe the language of Defendant's policy and apply an ordinary meaning to disputed terms, this court refuses to imply a broad meaning for the term "loss," especially when that meaning would be in conflict with the term's ordinary meaning. This court finds that an ordinary meaning for the term "loss" as used in the context of Defendant's policy is hospitalization and death. If Defendant wanted to exclude coverage where sickness is the cause of an accident, rather than the cause of the loss, it could have easily written that specifically into the policy. Having not excluded coverage where sickness is the cause of the accident, the plain language of the policy provides coverage in this instance. Accordingly, this court grants Plaint'ff s motion for summary judgment as to coverage and pre-judgment interest.

*Appendix 2*

**Attorney Fees**

Plaintiffs claim that if this court grants summary judgment in their favor, they are entitled to an award of attorneys fees under *Billings v. Union Bankers Ins. Co.*, 918 P.2d 461, 468 (Utah 1996). In *Billings*, the Utah Supreme Court held that the insured under a first party insurance contract can recover attorney fees as consequential damages for breach of an express term of the contract if the fees "were reasonably within the contemplation of, or reasonably foreseeable by, the parties at the time the contract was made." *Id.* at 468 (citation omitted). The *Billings* court found that it was reasonably foreseeable at the time the insurance policy was issued that if the insurer breached its contract by denying a valid claim, the beneficiaries would incur attorney fees in pursuing the claim. *Id.*

Defendant attacks the continuing viability of the rule *of* law expressed in *Browning*, however, it does so by relying on cases involving a breach of the implied covenant of good faith and fair dealing rather than the breach of the express terms of the policy. *See Lieber v. ITT Hartford Ins. Center, Inc.*, 15 P.2d 1030, 1037 (Utah 2000) (remanding attorney fees issue for a determination of whether insurer breached covenant of good faith and fair dealing); *Gibb M. Smith, Inc. v. United States Fidelity & Guaranty*, 949 P.2d 337, 334-35 (Utah 1997) (finding award of attorney fees premature because trial court had not yet determined whether there was a breach of the implied covenant of good faith and fair dealing).

*Appendix 2*

Because *Billings*' award of attorney fees for a breach of an express contract term has not been overruled or limited by any subsequent Utah case law, this court concludes that Plaintiffs are similarly entitled to an award of attorney fees. Plaintiffs are ordered to submit a detailed request for attorney fees to be awarded by the court.

**CONCLUSION**

For the reasons stated above, Defendant's Motion for Summary Judgment is DENIED and Plaintiffs' Motion for Summary Judgment is GRANTED.

DATED this 7th day of September, 2001.

s/ Dale A. Kimball
DALE A. KIMBALL
United States District Judge

## APPENDIX 3 — ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION DATED NOVEMBER 27, 2001

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Civil No. 2:96 CV 283K

LUJUAN C. JOHNSON and STEVEN JOHNSON,

Plaintiff,

v.

LIFE INVESTORS INSURANCE COMPANY OF AMERICA, an Iowa corporation.

Defendants.

ORDER AND JUDGMENT

This matter is before the court on Plaintiffs' Motion to Assess Attorneys' Fees and Enter Judgment and Defendant's Objection to Request for Attorneys Fees and Proposed Judgment. The court concludes that oral argument would not significantly aid it in its determination of the issue. The court, has carefully reviewed the memoranda and other materials submitted by the parties as well as the facts and law relative to this motion. Now being fully advised, the court enters the following order.

*Appendix 3*

Defendant's objection to Plaintiffs' request for attorneys' fees does not attack the reasonableness of the fees requested. Rather, Defendant's objection to the award of attorneys' fees asks this court, in light of the recent decision by the Utah Supreme Court in *Campbell v. State Farm*, 2001 UT 89, 432 Utah Adv. Rep. 44 (October 19, 2001), to reconsider its September 7, 2001 Order ruling that Plaintiffs were entitled to an award of reasonable attorneys' fees as consequential damages for Defendant's breach of the express terms of the insurance contract. This court declines to find that *Campbell* impliedly overruled *Billings v. Union Bankers Insurance Co.*, 918 P.2d 461, 468 (Utah 1996), relied upon by this Court in its September 7, 2001 Order. As with the other cases relied upon by Defendant in its arguments on summary judgment, the *Campbell* case addresses only the entitlement to fees based upon breach of the implied covenant of good faith and fair dealing not the entitlement of fees based upon the breach of an express term of the insurance contract. Therefore, the recent decision in *Campbell does* not affect this court's September 7, 2001 Order granting Plaintiffs reasonable attorneys fees.

Based upon the court's review of the affidavits and materials submitted by Plaintiffs' attorneys regarding the fees requested, this court finds that the fees requested are reasonable. The fees have been adequately limited to those necessary to pursue Plaintiffs' claim against Defendant Life Investors. This court awards Plaintiffs $72,907.08 in attorneys' fees and $3,041.91 in costs. Also, consistent with this court's summary judgment order, Plaintiffs are entitled to prejudgment interest accrued as to the date of this Order and Judgment in the amount of $104,391.90 in addition to

the principal amount under the insurance contract in the amount of $200,900.

Therefore, judgment is hereby entered on behalf of Plaintiff against Defendant in the amount of **$381,240.89**.

DATED this 27th day of November, 2001.

s/ Dale A. Kimball
DALE A. KIMBALL
United States District Judge

## APPENDIX 4 — ORDER AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DATED JULY 11, 2000

**UNITED STATES COURT OF APPEALS**
**TENTH CIRCUIT**

**Nos. 98-4120, 98-4121, 98-4122.**

July 11, 2000.

Lajuan C. JOHNSON and Steven Johnson,

Plaintiffs-Appellees and Cross-Appellants,

v.

LIFE INVESTORS INSURANCE COMPANY OF AMERICA, an Iowa corporation, and Monumental Life Insurance Company, a Maryland corporation,

Defendants-Appellants and Cross-Appellees.

Before TACHA, BRORBY, and EBEL, Circuit Judges.

ORDER AND JUDGMENT*

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* This order and judgment is not binding precedent except under the doctrines of law of the case, *res judicata* and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

*Appendix 4*

BRORBY

This case arises out of a dispute over insurance policies issued by Life Investors Insurance Company of America (Life Investors), and Monumental Life Insurance Company (Monumental) in favor of Marvin Johnson, deceased. Life Investors and Monumental appeal the order of the district court granting summary judgment in favor of LaJuan Johnson and Steven Johnson, the plaintiffs and beneficiaries of insurance policies issued by the two insurance companies. LaJuan and Steven Johnson (the Johnsons) cross-appeal the denial of attorney fees. We exercise jurisdiction pursuant to 28 U.S.C. § 1291 and affirm the grant of summary judgment in favor of the Johnsons in their case against Monumental, affirm the denial of attorney fees to the Johnsons from Monumental, and reverse and remand the grant of summary judgment against Life Investors, and denial of attorney fees to the Johnsons from Life Investors, to the district court for further proceedings in accordance with this opinion.

## I. FACTUAL BACKGROUND

For the purpose of ruling on the summary judgment motions, the district court relied on the following undisputed material facts. In February 1989, Mr. Johnson bought an accidental death policy from American Express Life Assurance Company (AMEX). In December 1989, Mr. Johnson and his wife, LaJuan Johnson, completed a "request for increased benefits" form in response to a request they received from AMEX. In February 1993, Life Investors assumed responsibility for the insurance policy issued by AMEX to Mr. Johnson. Also in 1993, Mr. Johnson purchased

a policy for accidental death insurance from Monumental, designating his wife, LaJuan, and his son, Steven, as beneficiaries.

Years prior to his purchase of these policies, Mr. Johnson had been diagnosed with myotonic dystrophy, a form of muscular dystrophy. He received treatment for this disease until his death in 1995. Mr. Johnson developed muscle weakness as a result of the myotonic dystrophy. Although he remained relatively active, Mr. Johnson did occasionally stumble and fall down. In 1991, Mr. Johnson fell down the stairs in his home and received treatment in the hospital for his injuries.

On July 29, 1995, Mr. Johnson stumbled and fell while carrying a tray up the stairs in his home, causing a cervical neck fracture and a possible thoracic rib fracture. Mr. Johnson was admitted to the hospital in the early morning hours of July 30, 1995 and was treated for his injuries. On August 1, 1995, while still in the hospital, Mr. Johnson began to experience symptoms of pneumonia. His doctor transferred him to the care of a pulmonologist in the intensive care unit. Because Mr. Johnson began experiencing difficulty breathing, physicians attempted to intubate him to clear his lungs. However, this proved extremely difficult due to his neck fracture. During the next day, it became apparent Mr. Johnson could no longer breathe on his own and would survive only with the assistance of long-term ventilatory support. On August 2, 1995, authorized hospital staff withdrew artificial life support measures and Mr. Johnson passed away. Dr. Edward Campbell filled out the death certificate and listed the immediate cause of death as pneumonia, due to or as a

consequence of a cervical spine fracture, and the underlying cause of death as myotonic dystrophy. He identified the manner of death as an "Accident."

Mrs. Johnson and Steven Johnson made claims under the insurance policies following Mr. Johnson's death. Both insurance companies denied these claims, relying on language in their policies excluding death caused by sickness and defining an "injury" as a bodily injury caused by an accident "independent of all other causes."[1]

1. The relevant language in the Monumental policy is as follows:

> . . . INJURY means bodily injury caused by an accident. The accident must occur while the Covered Person's insurance is in force under the Group Policy. The Injury must be the direct cause of the Loss and must be independent of all other causes. The Injury must not be caused by or contributed to by Sickness.
>
> . . .
>
> We will not pay a benefit for a loss which is caused by, results from, or [is] contributed to by:
>
> . . .
>
> (5) Sickness or its medical or surgical treatment, including diagnosis. . . .

The pertinent language from the Life Investors/AMEX policy is as follows:

> "Injury" means bodily injury of a Covered Person which:
>
> 1. is caused by an accident which occurs when the Covered Person's insurance is in force under the Policy; and

(Cont'd)

*Appendix 4*

II. PROCEDURAL BACKGROUND

Following the insurance companies' denial of coverage, the Johnsons filed suit in the district court, claiming the companies breached their contracts. However, rather than making a determination on whether the companies breached the contracts, the district court instead concluded the companies were estopped from relying on the sickness exclusions to deny coverage because the companies failed to disclose the sickness exclusions in the manner required by Utah insurance regulations. Consequently, the district court granted the Johnsons' motions for summary judgment in both cases, and denied the companies' cross-motions for summary judgment. The district court also denied the Johnsons' request for attorney fees.

Monumental and Life Investors now appeal the district court's grant of summary judgment to the Johnsons and denial of their motions for summary judgment. Neither company

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(Cont'd)

> 2. results in loss insured by the Policy; and
>
> 3. creates loss due, directly and independently of all other causes, to such accidental bodily injury.
>
> The Policy does not insure for any loss resulting from any Injury caused or contributed to by, or as a consequence of . . .
>
> . . .
>
> 3. any sickness or infirmity unless the treatment of such is required as the direct result of an accidental bodily injury. . . .

denies it failed to disclose the sickness exclusion in the manner required by the regulation.[2] Instead, each argues the regulation is inapplicable to its policy. Monumental contends the disclosure obligations do not apply to accidental death policies. Life Investors concedes the disclosure regulation applies to accidental death policies but contends the regulation is inapplicable to its policy because Utah adopted the rule after AMEX issued the original policy to Mr. Johnson. Both companies argue they are entitled to summary judgment because the Johnsons failed to show Mr. Johnson's death resulted from an accident and independently of all other causes. The Johnsons cross-appeal the denial of their request for attorney fees.

## III. APPLICATION OF THE DISCLOSURE REQUIREMENT TO THE POLICIES

### A. Standard of Review

Because the district court's jurisdiction over this matter was based on diversity of citizenship, it was required to discern and apply the substantive law of Utah, the forum state, with the objective of reaching the same result as would a Utah court. *See Brodie v. General Chem. Corp.*, 112 F.3d 440, 442 (10th Cir.1997). We review *de novo* the district court's determinations of the substantive law of Utah. *See id.* However, although the substantive law of Utah governs the analysis of the underlying claim in this case,

2. The district court determined the language of the exclusionary provisions is buried in each policy and not in bold or color typeface as required by Utah's regulations. The court also concluded the exclusions do not clearly inform laymen as to what coverage exists.

federal law controls the ultimate procedural question—whether summary judgment is appropriate. *See Oja v. Howmedica, Inc.*, 111 F.3d 782, 792 (10th Cir.1997); *May v. National Union Fire Ins. Co.*, 84 F.3d 1342, 1345 (10th Cir.1996). "We review the grant of summary judgment de novo, applying the same standard as did the district court. Summary judgment is then appropriate if, after reviewing all of the evidence submitted in the light most favorable to the non-movant, no genuine issue of material fact survives to merit a trial." *Chambers v. Colorado Dep't of Corrections*, 205 F.3d 1237, 1241 (10th Cir.2000) (citations omitted); Fed.R.Civ.P. 56(c). "Where, as here, the parties file cross motions for summary judgment, we are entitled to assume that no evidence needs to be considered other than that filed by the parties, but summary judgment is nevertheless inappropriate if disputes remain as to material facts." *James Barlow Family Ltd. Partnership v. David M. Munson, Inc.*, 132 F.3d 1316, 1319 (10th Cir.1997), *cert. denied*, 523 U.S. 1048 (1998). "Where different ultimate inferences may properly be drawn, the case is not one for a summary judgment." *Seamons v. Snow*, 206 F.3d 1021, 1026 (10th Cir.2000) (quotation marks and citation omitted).

B. Monumental

We first address Monumental's argument the Utah disclosure regulation does not apply to its accidental death policy. The regulation at issue is found in the portion of the Utah Administrative Code dealing with insurance administration, and entitled "Individual and Franchise

Disability Insurance, Minimum Standards." Utah Admin. Code R590-126. The disclosure regulation provides:

> Accident-Only Disclosure. All accident-only policies shall contain a prominent statement on the first page of the policy, or attached thereto, in either contrasting color or in boldface type at least equal to the size of type used for policy captions, as follows: "This is an accident-only policy, and it does not pay benefits for loss from sickness."

Utah Admin. Code R590-126-6G. The scope of Rule 590 is described as follows:

> This rule shall apply to all individual and franchise *disability* insurance policies. . . . The rule shall apply only to coverage issued after the effective date of the rule.

Utah Admin. Code R590-126-2B (emphasis added). Rule 590 provides a list of definitions "[i]n addition to the definitions of Sections 31A-1-301 and 31A-22-605(2), U.C.A. [the general provisions of the Utah Insurance Code]," which are to "apply for the purposes of this rule." Utah Admin. Code R590-126- 3A. The term "disability insurance" is defined in the general provisions of the Utah Insurance Code as:

> insurance written to indemnify for *losses and expenses resulting from accident* or sickness, to provide payments to replace income lost from accident or sickness, and to pay for services resulting directly from accident or sickness,

> including medical, surgical, hospital, and other ancillary expenses.

Utah Code Ann. § 31A-1-301(26) (Supp.1996) (emphasis added). Monumental contends the term "disability insurance" as defined above, is too narrow to encompass an accidental death policy, and thereby argues the disclosure requirement contained in the regulation section entitled "disability insurance," does not apply to its policy.

The Utah courts have never determined whether the rules set forth in the "Individual and Franchise Disability Insurance" section of the insurance code apply only to disability insurance policies or to other types of insurance policies such as those addressing accidental death insurance. However, the general provisions of the Utah Insurance Code define "disability insurance" broadly to include insurance policies covering "losses" resulting from accident or sickness. *See* Utah Code Ann. § 31A-1-301(26). Nothing in the regulations indicates that "losses" resulting from accident or sickness do not include death. Moreover, as the district court noted, the regulations dealing with "disability insurance" specifically mention policies providing for accidental death benefits in several subsections.[3] Thus, it is

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3. For example, the subsection entitled "Disability, Minimum Standards for Benefits," defines and sets the minimum standards for "Accident Only Coverage" as follows:

> a policy of accident insurance which provides coverage, singly or in combination, *for death,* dismemberment, disability, or hospital and medical care caused by accident. *Accidental death* and double dismemberment

(Cont'd)

clear Utah implemented the "disability insurance" regulations with the intent to cover accidental death policies. Even though these regulations are not codified, in Utah, insurance regulations "passed pursuant to a statutory grant of authority have the full force and effect of law." *Horton v. Utah State Retirement Bd.*, 842 P.2d 928, 932 n.2 (Utah Ct.App.1992) (citations omitted); *see also V-1 Oil Co. v. Department of Envtl. Quality*, 904 P.2d 214, 218-19 (Utah Ct.App.1995). Consequently, we conclude the mandatory disclosure provision contained in section R590-126-6G of the Utah Administrative Code applies to Monumental's accidental death policy.

Because Monumental's policy did not comply with the disclosure regulation when issued, we also conclude the district court applied the appropriate remedy by striking the exclusionary language of the policy. *See General Motors Acceptance Corp. v. Martinez*, 668 P.2d 498, 502 (Utah 1983)

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(Cont'd)

> amounts under such a policy shall be at least $1,000 and a single dismemberment amount shall be at least $500.

Utah Admin.Code R590-126-7H (emphasis added). Likewise, "Specified Accident Coverage" is defined as:

> an accident insurance policy which provides coverage for a specifically identified kind of accident (or accidents) for each person insured under the policy for *accidental death* or accidental death and dismemberment, combined with a benefit amount not less than $1,000 for accidental death, $1,000 for double dismemberment and $500 for single dismemberment.

Utah Admin.Code R590-126-7I(1) (emphasis added).

(holding the insurance company was estopped as a matter of law from denying coverage under its policy due to its failure to comply with Utah insurance law).[4] *See also Cullum v. Farmers Ins. Exch.*, 857 P.2d 922, 926-27 (Utah 1993) (concluding failure to comply with Utah insurance law rendered an exclusion provision in the insurance contract unenforceable).[5] As a result, under the circumstances

4. We reject Monumental's argument *Martinez* cannot apply because it involved an insurance company's failure to comply with Utah codified law as opposed to mere insurance regulations. In support of its argument, Monumental also contends estoppel cannot apply to violation of an agency rule which it claims prohibits private relief. Contrary to these contentions, nothing in Utah's insurance regulations prohibits private relief. Given Utah's insurance regulations maintain the full force and effect of law, *Horton*, 842 P.2d at 932 n.2, we see no difference in whether Monumental violated codified or regulatory provisions. As a consequence, it follows that if the private remedy of estoppel is available for one, it is also available for the other.

5. Monumental argues the district court erred by striking the language defining "injury" in its policy. Monumental argues the district court acted overzealously by striking this language as a consequence of its violating the disclosure regulation. Monumental also contends even if the district court correctly determined its definition was more restrictive than allowed by Utah insurance regulations, the proper remedy would have been to substitute the statutory definition of "injury" provided in Utah Admin. Code R590-126-3A(1)(a). Monumental further argues even if the district court substituted the less restrictive language to define injury under the contract, it still would not have been required to pay death benefits to the Johnsons. We disagree.

The purpose of the disclosure regulation is to alert the insured to the sickness exclusion. *See* Utah Admin. Code R590-126-2A. It is

(Cont'd)

presented, Monumental's claim Mr. Johnson's myotonic dystrophy caused or contributed to the fall which led to his death is irrelevant to our determination.[6] Because no material, controverted facts are left for a jury to decide in Monumental's case, the district court properly granted summary judgment in favor of the Johnsons.

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(Cont'd)
nonsensical to assert the insurer may violate the disclosure regulation and be estopped from relying on the sickness exclusion, but then allow the insurer to nevertheless deny coverage based on other language in the policy which effectively excludes injuries allegedly resulting, in part, from sickness. Thus, we reject Monumental's argument it is entitled to summary judgment because myotonic dystrophy contributed to Mr. Johnson's death.

6. Despite Monumental's contentions, the district court's ruling did not turn the policy into a "disability" or "life insurance" policy. Rather, the district court recognized the policy extended only accidental death insurance, but under the circumstances, extended such coverage without determining if an underlying illness caused the "accident," given the policy's failure to follow Utah's disclosure requirements. While Monumental argues the district court should have applied the exclusion and denied benefits under our holding in *Winchester v. Prudential Life Ins. Co. of America*, 975 F.2d 1479 (10th Cir.1992), it misses the point. First, the district court never reached the issue on whether *Winchester* applied to this case given Monumental's failure to comply with Utah's disclosure requirements. Consequently, even if we determined the exclusion adequately discloses that coverage does not extend to accidents resulting from pre-existing conditions, Monumental nevertheless violated Utah's disclosure regulations by burying the disclosure in the policy and not setting it out in bold or colored type.

*Appendix 4*

D. Life Investors

Life Investors asserts the disclosure regulation does not apply to its policy because AMEX issued the original policy before the disclosure regulation became effective.[7] The district court concluded Life Investors/AMEX subjected itself to the provisions of the regulation by accepting additional premiums for increased benefits after the effective date of the disclosure rule.[8] Life Investors argues the district court

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7. As stated previously, Mr. Johnson bought the accidental death policy from AMEX in February 1989. Utah enacted the Regulations at issue on June 20, 1989. Mr. Johnson increased his benefits in December 1989. In February 1993, Life Investors assumed responsibility for the AMEX insurance policy.

8. Life Investors points out the district court relied on the wrong certificate when rendering its decision. This mistake arose from the confusion generated when, during discovery, Life Investors mistakenly produced a copy of a specimen certificate which it did not send to the Johnsons. However, Life Investors drew the court's attention to this error in a motion to file a supplemental memorandum in support of its motion for summary judgment. The district court granted Life Investors' motion, and Life Investors subsequently filed a supplemental memorandum in support of its motion for summary judgment and attached the correct certificate. Although Life Investors maintains the district court committed plain error by relying on the incorrect certificate in rendering its decision, it contends the court would have reached the same decision even if it relied on the correct certificate, and asks us to review the district court's decision as if it relied on the correct certificate. The district court reasoned the definition of a "covered injury" contained on page five of the wrong certificate acted as an exclusion for sickness and struck the provision because it lacked bold-faced or colored type as required by the

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made this determination in error, and suggests the subsequent agreement did not constitute the formation of a wholly new contract that brought it under the auspices of the mandatory disclosure regulation.

Under Utah law, substantive statutes affecting vested rights do not apply retroactively. *See Olsen v. Samuel McIntyre Inv. Co.*, 956 P.2d 257, 260 (Utah 1998). However, because the Utah courts have never addressed whether an agreement to increase benefits in a life insurance contract creates a new policy, subject to statutes and regulations enacted after issuance of the original policy, we look to "other state court decisions, federal decisions, and the general weight and trend of authority" to determine how the Utah courts would resolve this issue. *May,* 84 F.3d at 1345 (quotation marks and citations omitted). Other courts, analyzing similar issues, have held an increase in premiums, benefits, or coverage, does not constitute the creation of a new certificate of insurance subject to regulations enacted after the original date the policy became effective. *See, e.g., Gahn v. Allstate Life Ins. Co .,* 926 F.2d 1449, 1456 (5th Cir.1991) (applying Louisiana law and holding the modification of the terms of an insurance policy does not create a new policy); *Metropolitan Property and Liability Ins. Co. v. Gray,* 446 So.2d 216, 219-20

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(Cont'd)

disclosure regulation. We agree the reasoning of the district court concerning the applicability of the disclosure regulation to Life Investors' policy would have been the same whether it relied on the correct or incorrect certificate, and thus, in the interest of resolving this dispute, we review the district court's decision as if based on the correct certificate.

(Fla.Dist.Ct.App.1984) (holding the mere addition of another person on a policy does not amount to a reissuance of the policy and thus, does not make the policy subject to statutes effective after the issuance of the original policy); *Crow v. Capitol Bankers Life Ins. Co.*, 891 P.2d 1206, 1211 (N.M.1995) (construing the insurance policy and rider as part of same contract for insurance); *Massachusetts Mut. Life Ins. Co. v. Thacher,* 222 N.Y.S.2d 339, 343 (N.Y.App.Div.1961) (determining a rider attached to the face of a policy containing an option for extended benefits on the payment of additional premium merely amounts to an extended privilege and does not create a new policy); *Hidary v. Maccabees Life Ins. Co.*, 591 N.Y.S.2d 706, 710 (N.Y.Sup.Ct.1992) (finding increases in face amount of coverage for payment of additional premiums did not constitute separate new policies); *French v. Insurance Co. of N. Am.*, 591 S.W.2d 620, 621-22 (Tex.Civ.App.1979) (reasoning the addition of a car to insurance policy did not create a new policy subject to a statute which became effective after the issuance of the original policy). We can see no reason why Utah would depart from the majority view on this point of law. Nevertheless, we turn to the Johnsons' argument the increase in benefits amounted to new "coverage" and thus, became subject to the disclosure regulation.

In support of their argument Life Investors became subject to the disclosure regulation when it accepted the Johnsons' additional premium payment after the disclosure regulation became effective, the Johnsons focus on the word "coverage" and point out the disability insurance rules "apply only to *coverage* issued after the effective date of the rule."

Utah Admin. Code R590- 126-2B (emphasis added). In applying this provision to their policy, the Johnsons point out AMEX sent them a letter after it received the additional premium payment stating:

> I have enclosed your revised Data Page for your Certificate APG1000984 which reflects your *increase in coverage.* Please replace the original Data Page with this new one.
>
> Your new quarterly premium will be $82.32. A charge of $56.95 has been placed on your American Express Card account. This represents the difference in premium due for your *additional coverage.*

(Emphasis added.) Based on this language, the Johnsons maintain that by increasing the benefits under the policy, AMEX issued new "coverage" after the effective date of the disclosure regulation, making Life Investors subject to the disclosure regulation. We disagree.

The term "coverage" when used in the context of an insurance contract is widely held to mean "[i]nclusion of a risk under an insurance policy; the risks within the scope of an insurance policy." Black's Law Dictionary 372 (7th ed.1999). *See Traders State Bank v. Continental Ins. Co.*, 448 F.2d 280, 283 (10th Cir.1971) ("The word coverage is, indeed, a term of art in the insurance industry, meaning the sum of all the risks assumed under the policy.") (quotation marks and citation omitted); *see also In re Joint E. and S. Dist. Asbestos Litig.*, 993 F.2d 313, 315 (2d Cir.1993);

*Appendix 4*

*Guaranty Nat'l Ins. Co. v. Bayside Resort, Inc.*, 635 F.Supp. 1456, 1458 (V.I.1986); *Illinois Farmers Ins. Co. v. Tabor*, 642 N.E.2d 159, 163 (Ill.App.Ct.1994); *Delcampo v. New Jersey Auto. Full Ins. Underwriting Ass'n*, 630 A.2d 415, 422 (N.J.Super.Ct. Law Div.1993); *Farmers Ins. Co. of Washington v. Frederickson*, 914 P.2d 138, 140 (Wash.Ct.App.1996). On the other hand, the term "benefit" is defined in Black's Law Dictionary as: "Financial assistance that is received from an employer, insurance, or a public program (such as social security) in time of sickness, disability, or unemployment." Black's Law Dictionary 151 (7th. ed.1999). *See Vogel v. Wells*, 566 N.E.2d 154, 161 (Ohio 1991) (quoting Black's Law Dictionary to define "benefit"); *Kratz v. Kratz*, 905 P.2d 753, 755 (Okla.1995) (relying on Black's Law Dictionary to define "benefit" in the context of an insurance contract).

Hence, neither definition persuades us an increase in "benefits" alone increases the "coverage" or assumed risks of an insurance contract, thereby creating a new or different contract or policy. Under the circumstances presented we conclude the increase in premiums and benefits did not change the nature of the coverage or create a new policy subject to the disclosure regulation because it did not alter the type of risk Life Investors assumed under the policy—it only altered the amount of the benefits Life Investors was obligated to pay in the event a legitimate claim arose under the policy. For these reasons, the district court erred by determining Life Investors was estopped as a matter of law from refusing to honor the Johnson's claim. We therefore remand to the district court for further proceedings in

accordance with this opinion on the Johnsons' claims against Life Investors, including their breach of contract claim.[9]

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9. The Johnsons contend they are entitled to summary judgment even if the district court erred by determining Life Investors was estopped from relying on the sickness exclusion to deny coverage. In support, the Johnsons argue the majority of jurisdictions, examining language in insurance contracts similar to the exclusionary language contained in their policy, refused to allow the insurance companies to rely on such language to deny coverage unless the preexisting illness constituted the "predominant cause" of the injury, or the preexisting illness "substantially contributed to the loss." In response, Life Investors argues the Utah Supreme Court would interpret the definition of "injury" in its policy to preclude coverage. Relying on *Winchester v. Prudential Life Ins. Co. of America*, 975 F.2d 1479 (10th Cir.1992), Life Investors urges us to reverse the district court's denial of its cross-motion for summary judgment and rule the Johnsons are not entitled to coverage under the policy as a matter of law because they cannot prove Mr. Johnson's death resulted directly from an accident, independent of all other causes. We leave the determination of this issue to the district court on remand. After filing their brief with this Court, the Johnsons filed a motion for us to certify this issue to the Utah Supreme Court, contending certification is proper because the Utah courts have not yet determined "how, under state law, language limiting coverage under accidental death policies where an insured suffers a preexisting disease should be interpreted. . . ." Life Investors filed no response to the Johnsons' motion to certify, but in its opposition to the Johnsons' motion for certification, Monumental argues this Court should interpret the "direct cause of loss, independent of all other causes" language as allowing it to deny coverage based on *Winchester* and without resorting to certification to the state court. We deny the Motion for Certification without reaching its merits, and decline addressing Monumental's motion in opposition, leaving the Johnsons free to reassert their motion to certify in the district court on remand.

*Appendix 4*

IV. ATTORNEY FEE ISSUE

Finally, we address the Johnsons' contention the district court erred by denying them attorney fees. In a diversity suit, the issue of attorney fees is considered a substantive matter and is controlled by state law. *Jones v. Denver Post Corp.*, 203 F.3d 748, 757 (10th Cir.2000). However, our standard of review is a matter of federal law and "[w]e review a district court's award of attorney fees for abuse of discretion. The district court's factual findings are only reversed if clearly erroneous. Legal conclusions and statutory analysis are reviewed de novo." *Parks v. American Warrior, Inc.*, 44 F.3d 889, 892 (10th Cir.1995) (citations omitted).

In Utah, the general rule is attorney fees are recoverable only if provided for in a contract at issue or by statute. *Occidental/Nebraska Fed. Sav. Bank v. Mehr,* 791 P.2d 217, 221 (Utah Ct.App.1990). However, exceptions to this general rule exist. In an insurance contract dispute where the insured sues the insurer for breach of contract, attorney fees may be recovered as consequential damages for either a breach of the express terms of the contract or for a breach of the implied covenant of good faith and fair dealing. *Billings v. Union Bankers Ins. Co.*, 918 P.2d 461, 468 (Utah 1996).

A. Breach of the Express Terms of the Contract

An insured may recover attorney fees as consequential damages for the breach of an express term in the insurance contract if the fees "were reasonably within the contemplation of, or reasonably foreseeable by, the parties at the time the contract was made." *Billings,* 918 P.2d at 468 (quotation

marks and citation omitted). Thus, in order to recover attorney fees as consequential damages flowing from a breach of express terms in the contracts, the Johnsons need to first show the companies breached the contracts. However, the district court never ruled on whether either company breached the express or implied terms of its contract. The district court instead found Monumental and Life Investors were estopped from relying on the sickness exclusions in their policies, and under the doctrine of estoppel, held the Johnsons could not recover attorney fees.

Given our and the district court's holdings that Monumental is estopped from denying coverage, we must examine the principles of estoppel to determine if attorney fees from Monumental are warranted in this case. To begin, estoppel does not operate to alter the terms of the contract as originally written. *See Perkins v. Great-West Life Assurance Co.*, 814 P.2d 1125, 1131 (Utah Ct.App.1991). Rather, estoppel is normally asserted as a defense to a claim or right and does not create an independent cause of action. *See Raymond v. Halifax Hosp. Med. Ctr.*, 466 So.2d 253, 255 (Fla .Dist.Ct.App.1985); *Lohse v. Atlantic Richfield Co.*, 389 N.W.2d 352, 357-58 (N.D.1986); *see also General Motors*, 668 P.2d at 502 ("Although estoppel is usually a factual defense, it may be established as a matter of law to preclude an insurance company from relying on an exclusion in a credit life and accident policy."). Estoppel merely abates the insurer's right to defend against the insured's claim for breach of contract by relying on the language in its policy. *See id.* Moreover, unlike breach of contract where the award of attorney fees is reasonably contemplated at the time of the contract, *Billings*, 918 P.2d at 468, estoppel is not an

independent cause of action like breach of contract, or a circumstance in which attorney fees are ever contemplated. It is not the same as breach of contract for the purpose of awarding attorney fees.

In applying this conclusion to the facts of this case, we note neither we nor the district court ever reached the issue of whether Monumental breached its contract with the Johnsons when holding Monumental is estopped as a matter of law from relying on the sickness exclusion. Therefore, the Johnsons are not entitled to attorney fees from Monumental under the theory Monumental breached the express terms of the contract. However, because we are reversing and remanding the district court's grant of summary judgment in favor of the Johnsons on their claim against Life Investors, we leave the determinations of whether Life Investors breached the express terms of its contract, and whether the Johnsons are entitled to attorney fees under Utah law, to the district court.

B. Implied Covenant of Good Faith and Fair Dealing

The Johnsons alternatively assert an award of attorney fees is proper because the companies breached the implied covenant of good faith and fair dealing.[10] In *Beck v. Farmers*

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10. The Johnsons assert because Life Investors did not answer their cross-appeal from the denial of attorney fees, it waived the issue. Although an appellant who chooses not to brief an issue may be deemed to waive the issue, *see Sheets v. Salt Lake County,* 45 F.3d 1383, 1390 (10th Cir.), *cert. denied,* 516 U.S. 817 (1995), this rule does not apply to appellees. The Johnsons, as the appellants, retain

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*Ins. Exch.*, 701 P.2d 795 (Utah 1985), the Utah Supreme Court recognized attorney fees may be available as consequential damages flowing from a breach of the implied covenant of good faith and fair dealing by an insurance company. *Id.* at 801. Under *Beck*, an insurer may be found to breach the implied covenant of good faith and fair dealing if it fails to diligently investigate the facts underlying a claim, fairly evaluate the claim, or "act promptly and reasonably in rejecting or settling the claim." *Id.* "[T]he overriding requirement imposed by the implied covenant is that insurers act reasonably ... in dealing with their insureds." *Billings*, 918 P.2d at 465. However, "when an insured's claim is fairly debatable, the insurer is entitled to debate it and cannot be held to have breached the implied covenant if it chooses to do so." *Id.*

The Johnsons contend "[a]s a matter of law, the Companies could not have acted diligently, fairly or reasonably in rejecting the Johnsons' claims, as they violated applicable Utah Insurance Department Regulations by which they were bound, and denied the claims in the face of the Regulations." However, they cite no case where failing to comply with insurance regulations has been found to be the equivalent of failing to fairly evaluate a claim or act promptly and reasonably in rejecting the claim. Nor are we persuaded by the Johnsons' argument. Monumental's contention the disclosure regulation did not apply to its contract is "fairly

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the burden to prove on appeal the trial court erred. If the insurance companies, as the appellees, choose not to defend the trial court's decision, this does not relieve the Johnsons of their burden to convince us of the district court's errors.

debatable" as the Utah courts have not ruled directly on the issue of whether the disability insurance regulations apply to accidental death policies. Obviously, because we agree with Life Investors that the regulation does not apply to its contract, we cannot hold Life Investors violated the covenant of good faith and fair dealing by asserting it is not estopped from relying on the sickness exclusion. However, on remand, the Johnsons might prove Life Investors breached the covenant of good faith and fair dealing on other grounds and that they are entitled to attorney fees in accordance with Utah law.

## V. CONCLUSION

For the foregoing reasons, and applying the principles for reviewing summary judgment determinations, we REVERSE the district court's order granting summary judgment to the Johnsons in their suit against Life Investors, and REMAND for further proceedings consistent with this opinion. As to the issue of attorney fees, we REVERSE and REMAND the district court's denial of attorney fees to the Johnsons from Life Investors for further proceedings consistent with this opinion. We AFFIRM the district court's grant of summary judgment in favor of the Johnsons against Monumental and AFFIRM the denial of attorney fees to the Johnsons from Monumental.

Supreme Court, U.S.
FILED
AUG 2 6 2004
OFFICE OF THE CLERK

No. 04-138

IN THE

# Supreme Court of the United States

LIFE INVESTORS INSURANCE COMPANY OF AMERICA,

*Petitioner*,

v.

LAJUAN C. JOHNSON and STEVEN JOHNSON,

*Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

## BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

Did the Tenth Circuit, in this diversity action, properly interpret Utah law in determining that the insured's accidental death was covered by the terms of the insurer's accidental death insurance policy?

Did the Tenth Circuit, in this diversity action, properly interpret Utah law in determining that the beneficiaries under the first party insurance policy are entitled to an award of attorney fees as consequential damages for the insurer's breach of the express terms of the insurance contract?

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## STATEMENT OF THE CASE

### A. Background

The decedent, Marvin Johnson ("Mr. Johnson"), was diagnosed with myotonic dystrophy in 1974, at age 42. Although he developed muscle weakness and other symptoms as a result of the myotonic dystrophy, he remained active. (Aplt. App. 180)[1] Mr. Johnson worked at hard physical labor in his burial vault business until he retired in 1991. It is not typical for patients with myotonic dystrophy to die at an unusually young age. While their life expectancy might be a little less than the average non-dystrophic, there is not a significant difference. Myotonic dystrophy patients do not die of this disease; they typically die of the same causes as other people. [Depo of Dr. Stanchfield, pp. 21-22 (Aplt. App. 51); Aff. of Lajuan Johnson, & 2 (Aplee. Supp. App. 40 )]

Mr. Johnson also remained quite active after his retirement, and was fully able to perform normal life functions up until the time of his accident in 1995. He cared for himself, including bathing, dressing and cooking meals. He used a stationary bike and a treadmill. He was responsible for household work, including much of the laundry and all of the yard work, both mowing the lawn in the summer and shoveling snow in the winter. Any problem he had with his grip did not interfere with his day to day activities. [Depo of Lajuan Johnson, pp. 31, 38,

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1. The citations to the record on appeal before the Tenth Circuit are to the Appellant's Appendix ("Aplt. App.") filed by petitioner Life Investors Insurance Company of America ("Life Investors") pursuant to *10th Cir. R.* 30.1, and the Appellees' Supplemental Appendix ("Aplee. Supp. App.") filed by respondents Lajuan C. and Steven Johnson pursuant to *10th Cir. R.* 30.2.

41, 68-69, 78-79 (Aplt. App. 70, 72, 79, 80, 82); Depo of Vicki Dorius, pp. 23-24 (Aplee. Supp. App. 26-27)]

Mr. Johnson was active in other ways as well. He would play ball with his grandchildren and swim once or twice with them every summer. He never missed a University of Utah basketball game. [Depo of Lajuan Johnson, p. 33 (Aplt. App. 71); Depo of Vicki Dorius, pp. 23-24 (Aplee. Supp. App. 26-27)]

Mr. Johnson walked frequently, sometimes even long distances, without mishap. He walked up and down staircases daily more than once a day without accident or injury (with one exception discussed below) up until the day of his accident. When he attended a University of Utah basketball game, he walked from the parking lot to the Huntsman Center arena. He walked up and down stairs to his seat in the Huntsman Center without ever falling. Even in 1995, the year of his death, he would walk down the stairs in the Huntsman Center, and then walk halfway around the concourse to get to his seat. On one occasion in January, 1995, his daughter parked a long distance away from the arena and he walked a great distance from the parking spot to the arena. [Depo of Lajuan Johnson, pp. 33, 40, 50 (Aplt. App. 71, 72, 75); Depo of Vicki Dorius, pp. 19-20 (Aplee. Supp. App. 24-25); Aff. of Lajuan Johnson, ¶¶ 3-4 (Aplee. Supp. App. 40)]

The television that Mr. Johnson typically watched was located in the downstairs area of the Johnsons' home. Until his death, Mr. Johnson walked up and down the same stairs on which he had his fatal accident, on a daily basis, often carrying dishes. He did this day after day without injury whatsoever, except for one occasion four years before his death when he fell forward down the stairs, resulting in minor injury. [Depo of Lajuan

Johnson, pp. 49-50, 52 (Aplt. App. 75); Aff. of Lajuan Johnson, ¶¶ 3-4 (Aplee. Supp. App. 40)]

Although on some occasions when he had gotten out of his rocking chair and tried to step forward, Mr. Johnson had gone down on all fours, he had never, to the knowledge of Mrs. Johnson, fallen backwards on stairs or elsewhere. [Aff. of Lajuan Johnson, && 4-5 (Aplee. Supp. App. 40-41); Depo of Lajuan Johnson, p. 63 (Aplt. App. 78)] Between November of 1993 and July 1995, Mr. Johnson had no acute illness or injuries, and sought no medical care except for the periodic dilation of his esophagus required by his hiatal hernia. His family did not notice any worsening of his condition. [Depo of Lajuan Johnson, pp. 67-70 (Aplt. App. 79, 80); Depo of Virginia Johnson, pp. 16-18 (Aplee. Supp. App. 30-32)]

Mr. Johnson described to his son Steven the July 29, 1995 fall that led to Mr. Johnson's death. Mr. Johnson said that he had made his dinner for the evening and had walked downstairs with his dishes on a tray. He watched a game or a movie. Afterwards, he was going back up the stairs carrying the dishes. He got almost to the top of the stairs and put one of his feet on the next step, but the foot wasn't stable enough on the step. When he lifted his other foot up he ended up slipping and falling, tumbling backwards.[2] [Depo of Steven Johnson, p. 21 (Aplee. Supp. App. 37)]

The fall fractured Mr. Johnson's neck, requiring him to be immobilized in the hospital, which resulted in pneumonia. Because of the neck fracture, the doctors could not effectively

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2. Contrary to Life Investors Petition for Writ of Certiorari ("Petition") at p. 2, there is no evidence in the record that Mr. Johnson's fall was caused by a "dizzy spell."

treat the pneumonia, and he died in the hospital four days after the fall. (Aplt. App. 180)

Dr. Campbell, who signed the death certificate,[3] was not qualified to give an opinion about the cause of Mr. Johnson's accident. Dr. Campbell is a pulmonologist who only treated Mr. Johnson during the last two days of his life, and admitted that he had no expertise in myotonic dystrophy, and that a neurologist would have the most expertise regarding myotonic dystrophy. [Depo of Campbell, pp. 39-40, 71 (Aplt. App. 114, 122)] In the opinion of Dr. Reichert, plaintiffs' expert neurologist, ". . . it is not possible to say with reasonable medical probability that myotonic dystrophy caused Mr. Johnson's fall on his stairs on July 29, 1995 . . ." People without this disease have falls under similar circumstances. [Reichert Aff. ¶¶ 4-5 (Aplee. Supp. App. 43)]

**B. Policy Provisions**

The benefit provisions of the Certificate of Group Insurance ("Insurance Certificate") issued to Mr. Johnson state as follows:

> **Loss of Life Indemnity Benefit:** If, as a result of Injury, a Covered Person dies within 120 days from the date of the accident which caused the Injury and the accident occurs while the person is insured under this Benefit, then we will pay the Loss of Life Indemnity which is shown in the Data Page as applicable to such Person.

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3. The death certificate is referred to in the Tenth Circuit Order and Judgment ("Opinion") that is the subject of the Petition [Appendix ("App.") 1 to Petition, p. 3a.]

**Accident Hospital Indemnify Benefit:** We will pay a daily benefit when a Covered Person is confined to a hospital while under the care of a Physician, but only if such Period of Confinement:

1. is necessary for the treatment of Injury which results from an accident which occurs while the person is insured under this Benefit; and

2. begins within 120 days from the date of such accident; and

3. begins while the person is insured under this Benefit.

. . . .

Aplt. App. 138.

The amount of the loss of life benefit is two hundred thousand dollars ($200,000.00), and the amount of the hospitalization benefit is two hundred dollars ($200.00) per day and two hundred fifty dollars ($250.00) per day for intensive care.[4] (Aplt. App. 137)

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4. Mr. Johnson was hospitalized for four (4) days before his death, two (2) days of which were in intensive care, as a result of his accidental injuries.

The following are the provisions in the Insurance Certificate upon which Life Investors relies in denying coverage:

**Definitions**

. . . .

"Injury" means bodily injury of a Covered Person which:

1. is caused by an accident which occurs when the Covered Person's insurance is in force under the Policy; and

2. results in loss insured by the Policy; and

3. creates loss due, directly and independently of all other causes, to such accidental bodily injury.

. . . .

(Aplt. App. 136)

**General Exclusions**

. . . .

The Policy does not insure for any loss resulting from any Injury caused or contributed to by, or as a consequence of . . .

. . . .

> 3. any sickness or infirmity unless the treatment of such is required as the direct result of an accidental bodily injury . . .

(Aplt. App. 139)[5]

## REASONS FOR DENYING THE PETITION

### I. THE PETITION SEEKS REVIEW OF ISSUES OF UTAH LAW ONLY

Life Investors ignores the standards governing this Court's grant of certiorari, as set forth in *Sup. Ct. R.* 10:

> **Rule 10.** *Considerations Governing Review on Certiorari*
>
> Review on a writ of certiorari is not a matter of right, but of *judicial discretion*. A petition for a writ of certiorari will be granted only for *compelling reasons*. The following, although neither controlling nor fully measuring the Court's discretion, indicate the *character of the reasons the Court considers*:
>
> > (a) A United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an *important federal question* in

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5. Respondent Steven Johnson is the beneficiary under the insurance policy. Respondent Lajuan Johnson is the personal representative of Mr. Johnston's estate. (Opinion, App. 1 to Petition, p. 3a.)

> a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an *important federal question* in a way that conflicts with relevant decisions of this Court.
>
> (c) a state court or a United States court of appeals has decided an *important question of federal law* that has not been, but should be settled by this Court, or has decided an *important federal question* in a way that conflicts with relevant decisions of this Court.
>
> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

(Emphasis added.) Thus, this Court grants certiorari primarily to consider "important federal questions."

Life Investors does not suggest why this Court should have any interest in reviewing a decision by the Tenth Circuit interpreting purely Utah law, particularly where, as discussed below, the Tenth Circuit's decision was based upon, and is consistent with, decisions of the Utah Supreme Court.

## II. THE TENTH CIRCUIT CORRECTLY INTERPRETED UTAH LAW ON THE INSURANCE COVERAGE AND ATTORNEY FEE ISSUES.

Life Investors denied coverage under the policy because Mr. Johnson had a pre-existing illness, myotonic dystrophy, which Life Investors contends caused or contributed to the accident. However, based on the terms of the policy and as a matter of Utah law, the Tenth Circuit correctly ruled that the cause of the *accident* is irrelevant to coverage. Instead, the only issue relevant to coverage is the cause of the *injury* and *loss*, i.e., the broken neck, hospitalization and death. Because it is undisputed that the sole cause of Mr. Johnson's broken neck, hospitalization and death was the accident, not myotonic dystrophy, he was covered under the policy.

The Tenth Circuit was also correct in ruling that under Utah law respondents are entitled to recover attorney fees for Life Investors' breach of the express terms of the policy. In *Billings v. Union Bankers Ins. Co.*, 918 P.2d 461 (Utah 1996), the Utah Supreme Court held that the insured under a first party insurance contract is entitled to attorney fees as consequential damages for breach of the express terms of the contract, if such fees were reasonably foreseeable at the time the contract was made. Life Investors does not dispute that it was reasonably foreseeable at the time the policy was issued that if Life Investors denied a claim, the beneficiary would incur attorney fees in litigating the claim.

Instead, Life Investors argues that other Utah appellate court decisions cast doubt on whether *Billings* is good law. However, none of the cases Life Investors relies upon even address the above holding in *Billings*, which is good law in Utah, and was also followed by the Tenth Circuit on the first appeal in this case.

## A. Insurance Coverage

### 1. The Policy Language

Life Investors denied coverage under the accidental death and hospital benefit policy, based on the allegation that myotonic dystrophy caused or contributed to Mr. Johnson's accident. However, the relevant provisions of the policy, quoted above, do not address the cause of the accident; they only address the cause of the "loss" or the "injury."

"Injury" is a defined term under the policy. It means "bodily injury" occurring where three conditions are met. First, the "bodily injury" must have been "caused by an accident" occurring while coverage was in effect. (Aplt. App. 136) Here, it is undisputed that Mr. Johnson suffered "bodily injury," i.e., a broken neck (unlike the heart attack cases discussed below), as a result of his accidental fall backward down the stairs at his home, while covered under the policy.

Second, the "bodily injury" must result in "loss insured by the Policy." (*Id.*) Although "loss" is not a defined term in the policy, in light of the benefits provided it can only mean death and/or hospitalization.[6] This interpretation is also supported by a dictionary definition of the term "loss," as used in the insurance context: "the amount of an insured's financial detriment by death or damage that the insurer becomes liable for." *Webster's New Collegiate Dictionary*, p. 681 (G&C Merriam Co. 1977) Here,

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6. Because the policy fails to define "loss," or to address the cause of an accident, it is ambiguous and must be construed against Life Investors. *See*, *Utah Farm Bureau Ins. Co. v. Crook*, 980 P.2d 685, 686-687 (Utah 1999) (An insurance policy is ambiguous if ". . . it is unclear, omits terms, has multiple meanings or is not plain to a person of ordinary intelligence.")

it is also undisputed that Mr. Johnson was hospitalized and later died because of the accidental "bodily injury."

Third, the "loss" (i.e., hospitalization and death) must be "due, directly and independently of all other causes, to such accidental bodily injury." (Aplt. App. 136) This is the language upon which Life Investors hangs its hat in denying coverage, arguing that myotonic dystrophy caused or contributed to the "loss." However, even if myotonic dystrophy caused or contributed to the accident, i.e., the fall down the stairs (which plaintiffs dispute), it did not cause the "loss," i.e., the hospitalization and death.

Mr. Johnson's hospitalization and death had nothing to do with myotonic dystrophy. They were caused solely by his accidental fall backward down the stairs. The accidental "bodily injury" caused the "loss," and the cause of the accident is simply irrelevant.

Life Investors also relies on the above quoted policy exclusion, which excludes "loss resulting from an Injury caused or contributed to by, or as a consequence of . . . 3. any sickness or infirmity unless the treatment of such is required as the direct result of an accidental bodily injury . . ." (Aplt. App. 139) Again, however, myotonic dystrophy did not cause or contribute to the "Injury" here, i.e., the broken neck and resulting "loss." Moreover it does not aid Life Investors that pneumonia was the immediate cause of death, because it is undisputed that "the treatment of such [was] required as the direct result of an accidental bodily injury" (*Id.*), so that this exclusion indisputably does not apply to the pneumonia.

Also, one cannot equate the cause of the "injury" or "loss" with the cause of the "accident." These words are not

synonymous. One may have an "accident," such as a fall, without suffering "injury." Also, one may suffer a minor "injury" from an accidental fall without incurring a "loss" (here, hospitalization and death). The Life Investors' exclusion based on the cause of the "injury" or "loss" simply does not exclude coverage based on the cause of the "accident."

If Life Investors wanted to exclude coverage where sickness is the cause of the "accident," rather than the cause of the "loss" or "injury," it easily could have done so in the policy, as the Tenth Circuit ruled (Opinion, App. 1 to Petition, p. 9a), and as was done in cases discussed below. Not having excluded coverage where sickness is the cause of the accident, the plain language of the policy provides coverage here. As will be shown below, and as the Tenth Circuit correctly ruled (Opinion, App 1 to Petition, pp. 7a-10a), the foregoing policy interpretation is also supported by Utah case law.

### 2. Utah Case Law

*Browning v. Equitable Life Assur. Soc.*, 72 P.2d 1060 (Utah 1937) ("*Browning I*"), *rehearing den.*, 80 P.2d 348 (1938) ("*Browning II*"), involved a disability claim under an accident policy.[7] The insured accidentally sprained the index finger on his right hand. Apparently, the sprain activated a previously latent condition in the insured (referred to by the court as toxemia), resulting in arthritis in the finger. The policy, similar to the Life Investors policy here, insured ". . . against loss resulting directly and independently of all other causes, from bodily injuries effected . . . solely through external, violent and accidental means . . ." 72 P.2d at 1073.

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7. In the Petition, Life Investors inexplicably does not address *Browning I*, *Browning II*, or any other Utah case law on the Utah law issue of insurance coverage.

In the concurring opinion of Justice Larson in *Browning I*, which was the majority opinion on the interpretation of the above language, the court held that the insured's arthritis was a covered disability under the policy. Among other things, the court stated as follows with respect to the above quoted policy language:

> A sick man may be the subject of an accident *which would not have befallen him but for his sickness*. One may meet his death by falling into a place of danger *in a faint or in a fit of epilepsy. But [such] an event has usually been held to be the result of an accident, not of disease*. In Manufacturers' Acc. Indem. Co. v. Dorgan, 58 F. 945, 954, 7 C.C.A. 581, 22 L.R.A. 620, it was said by Mr. Justice Taft: "If the deceased suffered death by drowning, *no matter what was the cause of his falling into the water, whether disease or a slipping, the drowning, in such case, would be the proximate and sole cause of the disability or death*, unless it appeared that death would have been the result, even had there been no water at hand to fall into. *The disease would be but the condition; the drowning would be the moving, sole, and proximate cause*." See, also, Winspear v. Acc. Ins. Co., 6 Q.B.Div. 42; Ludwig v. Preferred Acc. Ins. Co., 113 Minn. 510, 130 N.W. 5; Preferred Acc. Ins. Co. v. Muir, 126 F. 926, 61 C.C.A. 456.

72 P.2d at 1076 (emphasis added).

Justice Wolfe, writing for the majority on other issues but as a dissenter on this issue, agreed with the above quoted analysis by Justice Larson:

> It is possible to divide the cases where an accident and another cause other than the accident both have their influence on the disability or death into the following categories:
>
> 1. Where the accident itself is caused by a pathological condition. Thus, where a dizzy spell causes a person to fall and fracture his skull. Without discussion or commitment on this class of cases, it would seem to the writer that they would be compensable under the language of the policy *because the chain of cause and effect should start from and not before the injury.* Any reason why the accident happened, whether carelessness, weak physical condition, or from unavoidability must be ruled out. *The causal chain begins from the point of injury.*

72 P.2d at 1070 (citation omitted, emphasis added).

The above quoted unanimous analysis in both the *Browning I* majority and dissent supports respondents' preceding argument that based on the policy language here, similar to the above quoted policy language in *Browning I*, if the loss is caused by an accident, the accident policy provides coverage, regardless of the cause of the accident.[8]

8. More recent cases from other jurisdictions, including Montana, Michigan, Texas and Oregon also agree that the cause of an accident is irrelevant to coverage under an accident policy containing coverage (Cont'd)

Before the Tenth Circuit, Life Investors argued that *Browning I* applied the efficient proximate cause doctrine and that under *Alf v. State Farm Fire and Cas. Co.*, 850 P.2d 1272 (Utah 1993), parties can contract this doctrine away. However, *Browning I* did not apply the efficient proximate cause doctrine, and, here, Life Investors contracted away any basis for excluding coverage based on the cause of the accident.

In *Alf*, the main water line to plaintiffs' home froze and burst. Large volumes of water escaped causing soil subsidence, resulting in extensive damage to several structures on the property. Although the burst water pipe was covered under plaintiffs' homeowner's policy, damage from earth movement was excluded, ". . . regardless of . . . the cause of the excluded event. . . ." 850 P.2d at 1273, n. 1 (quoting the policy). Based on this exclusion, the court affirmed the denial of coverage.

Among other things, plaintiffs argued that the efficient proximate cause doctrine required coverage. Under this doctrine, a cause that sets other intervening causes in motion is deemed to be the efficient proximate cause of the loss, rather than the intervening causes. *Id.* at 1277. The court held that the parties contracted away this doctrine under the above quoted policy language. *Id.* at 1277-1278.

*Browning I* did not apply the efficient proximate cause doctrine. Instead, as shown above, it declined to look backward

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(Cont'd)

provisions and exclusions similar to those at issue in the Life Investors' policy. *See*, *Pond v. North American Life & Cas. Co.*, 697 P.2d 1360, 1361-1362 (Mont. 1985); *Wells v. Prudential Ins. Co. of America*, 142 N.W. 2d 57, 58-59, 61 (Mich. App. 1966); *Nat. Life & Accident Ins. Co. v. Franklin*, 506 S.W. 2d 765, 766-768 (Tex. App. 1974); *Salisbury v. John Hancock Mut. Life Ins. Co.*, 486 P.2d 1279 (Or. 1971).

from the accident to determine the accident's cause (the cause of a cause). Similarly, it is Life Investors, not plaintiffs here, that seeks to apply the efficient proximate cause doctrine, by arguing that myotonic dystrophy was the cause of the accident. However, Life Investors, not plaintiffs, contracted away that doctrine by the very language of its own policy, which failed to exclude coverage based on the cause of the accident, as further shown by *Browning II*.[9]

On rehearing in *Browning II*, the defendant insurer raised, apparently for the first time, an exclusion in the accident policy that, unlike here, *expressly excluded coverage where the accident is caused by an illness*. The exclusion stated as follows:

> The insurance . . . shall not cover *accident*, injury, disability, death or other loss *caused* directly or indirectly, wholly or partly, by bodily or mental infirmity . . . or by any other kind of disease . . .

80 P.2d at 351 (first emphasis added, second emphasis in original).

In addressing this exclusion, the court correctly stated as follows:

> This provision of the policy means, therefore, that there is excepted from the insurance . . . injury or loss resulting from an accident or injury, where such *accident or injury* was caused, brought about, or induced, directly or indirectly by disease, [or] bodily

9. A quote in *Alf* from George Couch, *Cyclopedia of Insurance Law* (2d rev. ed. 1983) also does not benefit Life Investors because it talks about an exclusion where ". . . disease contributed to the death" (850 P.2d at 1278, quoting Couch), not where disease allegedly contributed to the accident.

> or mental infirmity . . . Thus it seeks to safeguard the company from such cases as where one subject to fits, falling from a fit sustains an injury from the fall . . .

*Id.* at 352 (emphasis in original).

Here, the Life Investors policy has *no* language excluding coverage based on the cause of the "accident." Thus, the above quoted language from the *Browning II* decision has no application here. If Life Investors wanted to exclude coverage based on the cause of the "accident," it could have and should have done so, as the insurer did in *Browning*. Because Life Investors did not do so, the cause of the accident is irrelevant.[10]

In *Whitlock v. Old American Insurance Co.*, 442 P.2d 26 (Utah 1968) the insured under an accident policy died following an auto accident. Prior to the accident the insured was diagnosed with cancer. The insurer denied coverage, contending, among other things, that the insured's weakened condition caused by the cancer contributed to his death. At issue was the following policy exclusion:

> This policy does not cover any loss or disability resulting directly or indirectly, in whole or in part, from (a) any mental or bodily sickness or disease.
>
> * * *

*Id.* at 27.

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10. Moreover, in the *Browning II* opinion, the court declined to change its decision that the insured's disability was covered by the accident policy, notwithstanding the policy exclusion.

In rejecting the insurer's contention, the court stated as follows:

> The defendant's argument seems to amount to this: Even though a person insured under an accident policy dies following an injury suffered in an accident, if he had any diseased condition which in any degree contributed in causing his death, in that a more robust person would not have died from the injury, recovery is prevented by the exception in its policy. *If this narrow restriction were accepted and followed to its logical conclusion it would in practical effect substantially cut away accident insurance coverage for people over middle age. A high percentage of them have some frailty or affliction from which they would die eventually and because of which an injury might more readily result in death than it would to a person not so afflicted. If this would prevent recovery under an accident policy the insurance sold to cover accidents would be but an illusion and acceptance of the premiums a fraud.*

*Id.* at 27-28 (emphasis added)

A similar analysis applies to Life Investors' arguments here. Life Investors argues that Mr. Johnson's myotonic dystrophy made him more susceptible to falling than the average person. Mr. Johnson was in his sixties at the time of the accident. An insured that age or older is likely to have one or more ailments making him or her more susceptible to accidents than a younger person.

Under Life Investors' theory, the insurer could almost always successfully deny coverage under an accident policy, to

an older insured who has an accident, by pointing to one or more pre-existing ailments as factors contributing to the accident. If insurers are allowed to get away with such an approach, based on unclear policy language as to what is covered and what is excluded, the effect would be to deprive the insureds of all benefits of an accident policy, once they reach a certain age.

Before the Tenth Circuit, Life Investors also pointed to other language in *Whitlock* which Life Investors claims supports its position. Addressing *Browning II*, *Whitlock* stated as follows:

> In the decision on rehearing, Justice Larson speaking for the court quoted with approval from Thornton v. Travelers' Ins. Co., 116 Ga. 121, 42 S.E. 287, 94 Am.St.Rep. 99, wherein it was pointed out that if the diseased condition of the insured did not *contribute in bringing about the accident* and injury, but merely aggravated the consequences of it, the plaintiff was entitled to recover.

442 P.2d at 28 (emphasis in original)

However, as indicated above, *Browning II* was addressing a policy exclusion, unlike the exclusion here, which expressly excluded coverage where illness contributed to the *accident*. *Whitlock* is correct that in addressing this exclusion, *Browning II* did cite the *Thornton* case with approval. However what *Whitlock* fails to point out is that, as noted in *Browning II*, the accident policy in *Thornton* also had an express exclusion where illness (a hernia) contributed to the accident:

> In Thornton v. Travelers' Insur. Co., 116 Ga. 121, 42 S.E. 287, 94 Am.St.Rep. 99, it is said (page 288):

> "The policy contained a stipulation in the following language: 'This insurance shall not cover * * * *accident*, nor injuries, nor disability, nor death, nor loss of limb or sight, *resulting wholly or partly, directly or indirectly,* * * * *from hernia*.'"

*Browning II*, 80 P.2d at 352, quoting *Thornton*, 42 S.E. at 288 (emphasis added)

Thus, the above statement in *Whitlock* about accidents caused by illness being excluded under an accident policy only applies where, as in *Browning* and *Thornton* and unlike here, the policy expressly excludes coverage if illness contributes to the "accident." Accordingly, the following statement made later in *Whitlock*: "The important fact is that his diseased condition has no causative relation to the accident" (442 P.2d at 29), must also be construed as applying only where, unlike here, there is an express contractual exclusion for accidents caused by illness.

The case Life Investors primarily relied upon in the Tenth Circuit is *Winchester v. Prudential Life Ins. Co. of America*, 975 F.2d 1479 (10th Cir. 1992), a Tenth Circuit case applying Utah law. However, *Winchester* was a heart attack case (pre-existing heart disease resulting in heart attack allegedly brought on by physical exertion) as was a Utah case *Winchester* partially relied on, *Elton v. Bankers Life & Cas. Co.* 516 P.2d 165 (Utah 1973) (pre-existing heart disease resulting in heart attack allegedly brought on by stress). However, for a variety of reasons discussed in both *Winchester* and *Elton*, under Utah law, heart attacks are typically not covered by accident policies. Falls, like Mr. Johnson's here, are covered.

*Winchester* is factually and legally distinguishable from the present case. *Winchester* was an ERISA case in which the court

reviewed the plan administrator's decision denying coverage under the accident policy, according to an arbitrary and capricious standard of review. 975 F.2d at 1483. No such deferential standard of review applies here.

Also, after discussing *Elton* and other Utah cases, *Winchester* ruled that under Utah law a heart attack did not constitute "bodily injury" within the meaning of the policy, because there had been no external violence or physical impact to the insured. *Id.* at 1486. Here, of course, the external violence and physical impact to Mr. Johnson from the fall backward down the stairs were severe enough to fracture his neck, ultimately resulting in death.

Once *Winchester* determined that the insured had not suffered "bodily injury," the court needed to go no further to reach its decision affirming the denial of coverage. However, in non-binding dictum, *Winchester* went on to interpret policy language similar to that present here.

As here, the accident policy in *Winchester* had both a limitation on coverage as well as an exclusion. The court described the limitation on coverage as follows:

> Specifically, the policy conditioned accidental death coverage on "[t]he [e]mployee [having] sustained an accidental bodily injury," and "[t]he injury, directly and independently of all other causes, [having] resulted in the *loss*."

975 F.2d at 1482-1483 (emphasis added) The exclusion stated that:

> "[a]ny *loss* which results . . . directly or indirectly from bodily or mental infirmity or disease." is "not covered."

*Id.* at 1487 (emphasis added).

The court interpreted these provisions as follows:

> We finally consider whether "[t]he injury, directly and *independently of all other causes*, resulted in the *loss* [emphasis added]." The policy thus makes clear that this provision excludes losses resulting even in part from pre-existing conditions. This theme is echoed in the exclusions . . . Thus, if Mr. Winchester did have a pre-existing infirmity, such as a heart condition, then his *death* did not result "directly and independently of all other causes."

*Id.* (first emphasis in original, remaining emphasis added). However, this interpretation (even if not dictum) is simply not dispositive of the issue presently before this Court.

The *Winchester* interpretation does little more than restate the policy language, i.e., if a pre-existing condition contributes to the "loss," i.e., "death" there is no coverage. *Winchester* simply does not address the issue present here, whether there is coverage when the pre-existing condition is not alleged to have contributed to the "loss" or "death," but to the *accident* that caused the death.

In *Winchester* (and *Elton*) the insured died of heart disease culminating in a fatal heart attack. Here Mr. Johnson died not as the result of myotonic dystrophy or any resulting medical condition, but as the result of a fall to which this disease allegedly contributed.

Thus, *Winchester* does not control here; *Browning* does. Under *Browning*, absent a policy limitation or exclusion expressly addressing the cause of the *accident*, as opposed to the cause of the *injury* or *loss*, the cause of the accident is

irrelevant to coverage, as is the case here.[11] Further, under *Whitlock*, alleged pre-existing conditions cannot be used as a pretext to avoid accident policy coverage of older insureds who die of accidents, such as Mr. Johnson.

**B. Attorney Fees**

In *Billings v. Union Bankers Ins. Co.*, 918 P.2d 461 (Utah 1996), the Utah Supreme Court held that the insured under a first party insurance contract, such as the Life Investors' policy here, can recover attorney fees as consequential damages for breach of the express terms of the contract: "Attorney fees may be recoverable as consequential damages flowing from an insurer's breach of *either* the *express* or the implied terms of an insurance contract." (*Id.* at 468, emphasis added) Fees are recoverable if they were reasonably foreseeable at the time the contract was made. *Id.*

Here, Life Investors does not dispute that it was reasonably foreseeable at the time the insurance policy was issued, that if the insurer denied a claim, the beneficiaries would incur attorney fees in litigating the claim. Instead, Life Investors argues that *Billings* is not good law on this issue, in light of two more recent Utah Supreme Court decisions, *Gibbs M. Smith , Inc. v. U.S.*

11. Life Investors was also wrong in arguing to the Tenth Circuit that respondents have the burden of proof, which is a state law issue in a diversity case. *See, Malandris v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 703 F.2d 1152, 1172, n. 11 (10th Cir. 1981), *cert. den.*, 464 U.S. 824 (1983). Even under Life Investors' interpretation of the policy, once respondents showed that the fall caused Mr. Johnson's death, under Utah law Life Investors had the burden of proving the cause of the fall. *See*, *Hassing v. Mut. Life Ins. Co. of New York*, 159 P.2d 117, 120 (Utah 1945). Also, the death certificate, discussed above, may be rebutted by other evidence (*Whitlock, supra*, 442 P.2d at 27), which respondents have done, as shown in the above Statement of the Case.

*Fidelity & Guaranty, Co.*, 949 P.2d 337 (Utah 1997); and *Lieber v. ITT Hartford Ins. Center, Inc.*, 15 P.3d 1030 (Utah 2000). However, neither of these cases undermines the above holding in *Billings*.[12]

*Smith* [and *Campbell v. State Farm Mut. Auto Ins. Co.*, 65 P.3d 1134 (Utah 2001), *rev'd. on other grounds*, 155 L Ed. 2d 585 (2003), cited by Life Investors before the Tenth Circuit] are distinguishable because they involved a claim by the insured against its insurer based on denial of third party liability coverage, rather than first party coverage, although the court in *Smith* referred to the claim as "a first-party action for third-party coverage." 949 P.2d at 344. In *Lieber*, plaintiff sought coverage under its employer's uninsured motorist coverage, which the court characterized as first party coverage. In all three cases, the court indicated that the insured was entitled to attorney fees if the insurer breached the implied covenant of good faith and fair dealing. However, none of these cases addressed the holding in *Billings* that an insurer is also liable for fees as consequential damages for breach of the express terms of a first party insurance contract.

It is unclear why *Smith*, *Lieber*, and *Campbell* failed to address the above holding in *Billings*. Perhaps the court in *Smith* felt that this holding did not apply to third party insurance coverage. The court in *Campbell* merely affirmed the entitlement to attorney fees for breach of the implied covenant of good faith, and had no reason to consider the issue of entitlement to fees for breach of the express terms of the contract. Also it may be

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12. All the other Utah cases Life Investors cites in the Petition on this issue predate *Billings*, except for the Utah Court of Appeals (the lower level appellate court in Utah) decision in *Pugh v. North American Warranty Services, Inc*, 1 P.3d 570 (Utah App. 2000).

that the respective insureds in the three cases did not raise the issue. One can only speculate.

What is not speculative is that (1) under *Billings*, respondents here are entitled to attorney fees as consequential damages because Life Investors breached the express terms of its first party insurance contract, and (2) nothing in *Smith*, *Lieber*, or *Campbell* purports to overrule, criticize, limit, distinguish or in any other way undercut this clear holding in *Billings*. There is simply silence on the issue in these three cases, which cannot be construed one way or the other.

Moreover, Life Investors ignores the fact that the Tenth Circuit acknowledged the continuing validity of the above holding in *Billings*, in the prior appeal *in this case*.[13] The Tenth Circuit ruled in its July 11, 2000 Order and Judgment (App. 4 to Petition, pp. 43a-45a) that under *Billings*, the insured is entitled to recover attorney fees as consequential damages for breach of either the express terms of a first party insurance contract, or the implied covenant of good faith and fair dealing.

Life Investors also argues that the ruling at issue in *Billings* was dictum and should not be followed for policy reasons. However, this ruling was not dictum, because, as the Tenth Circuit noted in its present Opinion, the jury had found that the insurer breached both the express terms of the insurance contract and the implied covenant of good faith and fair dealing. Also, *Billings* noted that there are at least two other types of contracts, the breach of which could result in an award of attorney fees as consequential damages under Utah law. 918 P.2d at 468.

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13. The decision in the prior appeal was issued *after Smith* was decided, but before *Lieber* and *Campbell*.

In addition, and as the Tenth Circuit also discussed, the dissent in *Billings* did not characterize the ruling at issue as dictum, and instead criticized it, making the same policy arguments as Life Investors now makes. The majority opinion obviously considered and rejected these arguments, and it is the majority opinion in *Billings* that is binding as to issues of Utah law, not the dissent.

Thus, it is clear that the Tenth Circuit was correct in ruling that *Billings* remains good law in Utah, on entitlement to attorney fees as consequential damages for breach of the express terms of a first party insurance contract.[14] (Opinion, App 1 to Petition, pp. 10a-11a)

## CONCLUSION

Based upon the foregoing, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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14. Even if *Billings* offered only dicta on this issue, the Tenth Circuit further held that "considered dicta by the state's highest 'court'" is important for the federal courts to use in predicting how the highest state court may rule (Opinion, App 1 to Petition, p. 11a.)